

7-1-1991

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Recommended Citation

Laurie S. Jamieson, *Educational Malpractice: A Lesson in Professional Accountability*, 32 B.C.L. Rev. 899 (1991),
<http://lawdigitalcommons.bc.edu/bclr/vol32/iss4/4>

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EDUCATIONAL MALPRACTICE: A LESSON IN PROFESSIONAL ACCOUNTABILITY

The rapid decline of American schools¹ has met with growing demands for educational accountability.² Since the late 1970s and early 1980s, an increasing number of students have attempted to recover damages for injuries that they allegedly suffered as the result of receiving a negligent education.³ A majority of these plaintiffs have been either special needs students claiming that an educational institution failed to diagnose them properly or place them in an appropriate program,⁴ or students alleging that a school sys-

¹ *The McNeill/Lehrer News Hour* (PBS television broadcast, Dec. 13, 1990) (transcript on LEXIS/NEXIS) (student performance in the nation's schools is continuing to decline prompting President Bush to call the nation's governors to an unprecedented education summit in Virginia). See generally D. KEARNS & D. DOYLE, *WINNING THE BRAIN RACE: A BOLD PLAN TO MAKE OUR SCHOOLS COMPETITIVE* (1988) (public education in the United States is in a crisis: the public schools graduate 700,000 functionally illiterate students every year).

² See Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 743-44 (1981); see also Valdes, *Accountability by Contract: A Proposal to Remedy the Harm of Substandard Schooling and Promote Equal Educational Opportunity*, 58 FLA. B. J. 280, 283-86 (1984).

³ See, e.g., *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1322-23 (N.D. Ill. 1990); *D.S.W. v. Fairbanks N. Star Borough School Dist.*, 628 P.2d 554, 555-56 (Alaska 1981); *Smith v. Alameda County Social Servs. Agency*, 90 Cal. App. 3d 929, 941, 153 Cal. Rptr. 712, 718 (Ct. App. 1979); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 817, 131 Cal. Rptr. 854, 856-57 (Ct. App. 1976); *Wickstrom v. North Idaho College*, 111 Idaho 450, 451, 725 P.2d 155, 156 (1986); *Pierce v. Board of Educ. of Chicago*, 44 Ill. App. 3d 324, 324-25, 358 N.E.2d 67, 68 (Ct. App. 1976), *rev'd*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977); *Rich v. Kentucky County Day School*, 793 S.W.2d 832, 833-34 (Ky. Ct. App. 1990); *B.M. v. State*, 200 Mont. 58, 59, 649 P.2d 425, 425-26 (1982); *Hunter v. Board of Educ. of Montgomery County*, 47 Md. App. 709, 710, 425 A.2d 681, 682 (Ct. Spec. App. 1981), *modified*, 439 A.2d 582 (Md. 1982); *Torres v. Little Flower Children's Servs.*, 64 N.Y.2d 119, 124-25, 474 N.E.2d 223, 227, 485 N.Y.S.2d 15, 19 (1984), *cert. denied*, 474 U.S. 864 (1985); *Palandino v. Adelphi Univ.*, 110 Misc. 2d 314, 314, 442 N.Y.S.2d 38, 38 (App. Div. 1981), *rev'd*, 89 A.D.2d 85, 454 N.Y.S.2d 868 (1982); *DeRosa v. City of New York*, 132 A.D.2d 592, 593, 517 N.Y.S.2d 754, 755 (App. Div. 1987); *Hoffman v. Board of Educ. of New York*, 64 A.D.2d 369, 385, 410 N.Y.S.2d 99, 110 (App. Div. 1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 31-32, 407 N.Y.S.2d 874, 876-77 (App. Div. 1978); *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); *Malone v. Academy of Court Reporting*, No. 90AP-264, 90AP-430 (Ohio App. Dec. 31, 1990) (LEXIS, States library, Omni file); *Poe v. Hamilton*, 56 Ohio App. 3d 137, 137, 565 N.E.2d 887, 888 (1990).

⁴ See, e.g., *D.S.W.*, 628 P.2d at 554; *Smith*, 90 Cal. App. 3d at 941, 153 Cal. Rptr. at 718; *Rich*, 793 S.W.2d at 834; *B.M.*, 200 Mont. at 62, 649 P.2d at 425.

tem graduated them despite their lack of minimum educational skills.⁵

Arguing that their claims resemble traditional negligence actions, plaintiffs have sought damages under the theory that a breach of professional duty has occurred.⁶ These plaintiffs claim that the duty to educate competently arises from common-law or statutory standards of care.⁷ Moreover, students who have brought suit against private institutions have asserted that a contract for services existed between the parties, and thus, courts should award damages for the breach of the contractual duty to educate.⁸

When first confronted with the tort-like educational malpractice claims in the late 1970s, the New York and California courts stated that an educational malpractice claim required plaintiffs to show that the educator owed them a duty of care that was breached, and that such breach proximately caused a measurable injury to the plaintiff.⁹ These courts maintained that recognition of an educational malpractice cause of action was dependent on whether educators had violated recognizable educational standards of conduct, and thereby, breached a duty of care that they owed to their students.¹⁰ Finally, these courts concluded that even if a legal duty existed theoretically, and a negligence claim was possible,¹¹ they should recognize educational malpractice only if public policy favored it.¹²

These early courts identified four general categories of public policy considerations that they would balance before they could

⁵ See, e.g., *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856; *Hunter*, 47 Md. App. at 710, 425 A.2d at 681-82. See generally Note, *Hunter v. Board of Education & Doe v. Board of Education - No Cause of Action For Educational Malpractice Against Public School Teachers and Psychologists*, 42 Md. L. Rev. 582, 583-85 (1983) (general discussion of the two different types of educational malpractice claims).

⁶ See, e.g., *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856; *Donohue*, 64 A.D.2d at 32, 407 N.Y.S.2d at 877, *aff'd*, 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 375; *Poe*, 56 Ohio App. 3d at 137, 565 N.E.2d at 888.

⁷ See, e.g., *D.S.W.*, 628 P.2d at 555-56; *Peter W.*, 60 Cal. App. 3d at 817-27, 131 Cal. Rptr. at 856-62; *B.M.*, 200 Mont. at 59-62, 649 P.2d at 425-27.

⁸ *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1323 (N.D. Ill. 1990); *Rich*, 793 S.W.2d at 834; *Wickstrom v. North Idaho College*, 111 Idaho 450, 451, 725 P.2d 155, 157 (1986); *Village Community School v. Adler*, 124 Misc. 2d 817, 818, 478 N.Y.S.2d 546, 547 (Civ. Ct. 1984).

⁹ See, e.g., *Peter W.*, 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 857; *Donohue*, 64 A.D.2d at 32-33, 407 N.Y.S.2d at 877.

¹⁰ See, e.g., *Peter W.*, 60 Cal. App. 3d at 820, 131 Cal. Rptr. at 857; *Donohue*, 64 A.D.2d at 32-33, 407 N.Y.S.2d at 877.

¹¹ See, e.g., *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377.

¹² *Peter W.*, 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859; *Donohue*, 47 N.Y.2d at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

recognize educational malpractice claims.¹³ The first category of public policy considerations was preventative considerations, which included the difficulties inherent in establishing an educational standard of care against which to measure defendants' conduct, in proving proximate cause, and in measuring injury.¹⁴ The second category of public policy considerations was moral considerations, which included the appropriateness of judicial review of school activity, education's social utility, and the student-teacher relationship.¹⁵ The final two categories of public policy considerations were economic and administrative concerns, which encompassed the possibility of a flood of new claims, and the litigations' fiscal impact on the community.¹⁶

Subsequent courts that have decided educational malpractice claims have applied public policy analyses to claims against both private and public educators, and to claims of misfeasance as well as claims of nonfeasance.¹⁷ Although no one court has discussed all of the issues, each has focused on one or more of the preventative, moral, administrative, or economic public policy considerations. Because recognition of educational malpractice is a state issue¹⁸ that a majority of courts have not yet confronted, each argument is persuasive authority.

Courts that have refused to recognize educational malpractice causes of action have concluded that a duty of care for educators does not exist.¹⁹ They have reasoned that neither the conduct of other educators nor statutory provisions establish a standard of care against which courts can measure educators' conduct.²⁰ Thus, they have asserted that absent a professional standard of care, there can be no breach of duty, and thus, no negligence liability.²¹ In addition,

¹³ See, e.g., *Donohue*, 64 A.D.2d at 33, 407 N.Y.S.2d at 877; see also *Peter W.*, 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859-60.

¹⁴ *Donohue*, 64 A.D.2d at 33, 407 N.Y.S.2d at 877.

¹⁵ *Id.*

¹⁶ See *Peter W.*, 60 Cal. App. 3d at 822, 131 Cal. Rptr. at 859; *Donohue*, 64 A.D.2d at 33, 407 N.Y.S.2d at 877.

¹⁷ See *infra* notes 99-101.

¹⁸ *Bishop v. Indiana Technical Vocational College*, 742 F. Supp. 524, 525 (W.D. Wis. 1990) (court considered a student's claim that she received an inferior educational experience from the defendant in violation of the United States Constitution and held that educational malpractice is a matter of state law).

¹⁹ See, e.g., *Peter W.*, 60 Cal. App. 3d at 824-25, 131 Cal. Rptr. at 854-55; see also *Hunter v. Board of Educ. of Montgomery County*, 47 Md. App. 709, 716, 425 A.2d 681, 685 (Ct. Spec. App. 1981), *modified*, 439 A.2d 582 (1982).

²⁰ See, e.g., *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

²¹ See, e.g., *Id.* at 824-25, 131 Cal. Rptr. at 854-55; see also *Hunter*, 47 Md. App. at 716, 425 A.2d at 685.

these courts have reasoned that one cannot prove causation and injury,²² and that educational malpractice necessitates unwarranted judicial oversight of professional educators' activities.²³ Finally, these courts have maintained that, if recognized, educational claims would threaten schools with an untold fiscal burden.²⁴

Conversely, those majority and minority opinions that have favored the recognition of liability for schools and their agents have focused on other similar professional malpractice claims that the courts recognize.²⁵ Some of these courts and justices have cited the availability of a standard of care for professional educators in the form of accepted pedagogic methods, statutory provisions, or contract terms.²⁶ Thus, these courts have concluded that educational malpractice actions present the same problems of proof of standard of care, proximate cause, and injury as other professional negligence claims, and thus, should be recognized.²⁷ Finally, some opinions have focused on the serious impact that negligent education has on children and society as a reason for favoring recognition of these claims.²⁸

This note examines in detail the public policy elements that have affected courts' recognition of an educational malpractice cause of action.²⁹ Section I briefly discusses the legal theories and methods of proof underlying professional malpractice in general.³⁰

²² See, e.g., *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 37, 407 N.Y.S.2d 874, 880 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); see also *Peter W.*, 60 Cal. App. 3d at 824-25, 131 Cal. Rptr. at 861.

²³ See, e.g., *Hoffman v. Board of Educ. of New York*, 49 N.Y.2d 121, 125-27, 400 N.E.2d 317, 320-21, 424 N.Y.S.2d 376, 378-79; see also *Torres v. Little Flower Children's Servs.*, 64 N.Y.2d 119, 126, 474 N.E.2d 223, 226, 485 N.Y.S.2d 15, 18 (1984).

²⁴ See, e.g., *Smith v. Alameda County Social Servs. Agency*, 90 Cal. App. 3d 929, 941, 153 Cal. Rptr. 712, 719 (Ct. App. 1979) (claim against a public agency and school); *Moore v. Vanderloo*, 386 N.W.2d 108, 114-15 (Iowa 1986) (doctor's educational malpractice within a medical malpractice claim); *Rich v. Kentucky County Day School*, 793 S.W.2d 832, 836 (Ky. Ct. App. 1990) (claim against a private school).

²⁵ See *Hunter*, 439 A.2d at 589 (Davidson, J., concurring in part and dissenting in part).

²⁶ See, e.g., *Id.* (professional conduct); *B.M. v. State*, 200 Mont. 58, 63, 649 P.2d 425, 427 (1982) (statutory duty of care); *County of Riverside v. Loma Linda Univ.*, 118 Cal. App. 3d 300, 319 n.7, 173 Cal. Rptr. 371, 379-80 n.7 (Ct. App. 1981) (contract terms).

²⁷ See *Hunter*, 439 A.2d at 589 (Davidson, J., concurring in part and dissenting in part).

²⁸ See *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 377 (1979); see also *Hunter*, 439 A.2d at 589 (Davidson, J., concurring in part and dissenting in part).

²⁹ Unlike earlier commentary, this note does not differentiate between special education and standard education claims, or between private and public defendants, but rather presents a general discussion of the overarching policy considerations that courts have considered when deciding whether to recognize educational malpractice claims.

³⁰ See *infra* notes 35-45 and accompanying text.

This section then discusses the seminal cases in educational malpractice that identified the relevant public policy considerations on which subsequent courts addressing educational malpractice have relied.³¹ Section II explores the preventative, moral, administrative, and economic considerations of public policy that courts use in their analyses of educational negligence.³² Section III discusses cases having parallel fact patterns to some educational malpractice claims, but which courts and plaintiffs have brought under a medical malpractice label.³³ Section IV evaluates the legitimacy of the courts' analyses of the public policy considerations that have slowed the recognition of educational malpractice claims, and concludes that these analyses are incomplete, inconsistent, and discriminatory.³⁴ Consequently, Section IV suggests that courts should revise their reasoning regarding these claims to reflect current reality, and thus, recognize educational malpractice.

I. PROFESSIONAL MALPRACTICE IN EDUCATION: AN HISTORICAL DEVELOPMENT

A. *The Foundation: Professional Malpractice Actions Generally*

If a person has knowledge, skill or even intelligence superior to that of an ordinary person, the law demands that his or her conduct be consistent with it.³⁵ Consequently, professionals are held to a higher standard of conduct than the ordinary person, and are required to possess a standard minimum level of special knowledge and ability.³⁶ The law has recognized professional malpractice actions when a professional demonstrates misconduct or an unreasonable lack of skill.³⁷ A malpractice claim requires that the professional owe the plaintiff a legal duty of care, that the professional breached that duty, and that the breach was the proximate cause of injury to the plaintiff.³⁸ Although most of the decided cases of

³¹ See *infra* notes 47-102 and accompanying text.

³² See *infra* notes 103-318 and accompanying text.

³³ See *infra* notes 319-440 and accompanying text.

³⁴ See *infra* notes 341-448 and accompanying text.

³⁵ W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS, § 32 (5th ed. 1984) [hereinafter PROSSER & KEETON].

³⁶ *Id.*

³⁷ Malpractice is defined as professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct which results in a loss or damage to the recipient of professional services or those entitled to rely upon them. BLACK'S LAW DICTIONARY 864 (5th ed. 1979).

³⁸ PROSSER & KEETON, *supra* note 35, at 164.

professional malpractice have dealt with medical personnel, courts have applied the theory to other professionals including lawyers, architects, engineers,³⁹ and clergy.⁴⁰

For example, physicians who hold themselves out as having professional knowledge and skill invite public reliance.⁴¹ Thus, the law requires that physicians demonstrate the minimum level of skill and knowledge that is usual and customary in their speciality areas.⁴² If a physician fails to demonstrate such skill or accepted conduct, and injures a person, an action for malpractice may arise.⁴³

If the physician might have followed differing schools of medical thought and alternative methods of acceptable treatment, a court will look for a standard of care in the tenants of the methodology that the physician professed to follow.⁴⁴ To serve as a standard of care, a medical school of thought must have definite principles, and a respectable minority of the profession must follow it.⁴⁵ When lay jurors are unable to evaluate complex medical technique questions, the parties involved in a malpractice claim may introduce expert testimony to prove negligence or wrongful conduct.⁴⁶

In sum, those individuals who hold themselves out to the public as having skill or knowledge beyond that of an ordinary person are professionals. As professionals, they are held to a higher standard of care in their activities than the ordinary person. Consequently, if they commit acts that a trier of fact could characterize as negligent or in conflict with common practice, courts can find them liable for malpractice.

B. *Educational Malpractice: The Early Cases Setting Out the Framework for Review*

In response to a growing dissatisfaction with the performance of American public schools, the public has called for accountability

³⁹ *Id.* at 185-86.

⁴⁰ Russ, *Minister Liable For 'Clergy Malpractice'*, 9 LAWYER'S ALERT 1 (June 11, 1990) (woman alleged that a minister sexually abused her while she was receiving spiritual counseling from him and was awarded damages for professional negligence and negligent infliction of emotional distress).

⁴¹ See PROSSER & KEETON, *supra* note 35, at 187.

⁴² See, e.g., *Rich v. Kentucky County Day School*, 793 S.W.2d 832, 834 (Ky. Ct. App. 1990).

⁴³ See PROSSER & KEETON, *supra* note 35, at 185 n.22.

⁴⁴ See *id.* at 187.

⁴⁵ *Id.*

⁴⁶ *Id.* at 188.

in education.⁴⁷ Commentators note that the heightened awareness of educational standards has resulted in students initiating lawsuits against their schools for educational malpractice.⁴⁸ A majority of these plaintiffs have based their claims on the legal theory of professional malpractice.⁴⁹ These plaintiffs have argued that because courts have found malpractice in other professions to be legally compensable, courts should also apply malpractice standards to the education profession.⁵⁰ That is, these plaintiffs have argued that educators have a minimum legal obligation to effect academic instruction so as to impart competence in basic subjects, just as doctors have a minimum obligation to perform medical procedures competently.⁵¹

In 1976, the California Court of Appeal, in *Peter W. v. San Francisco Unified School District*, was the first court to consider the application of the professional malpractice theory to educators.⁵² The *Peter W.* court held that no cause of action for a student against his school district existed.⁵³ The plaintiff in *Peter W.*, a graduate of the defendant's elementary and secondary schools, had alleged that the defendant and its employees had negligently failed to provide him with adequate instruction, guidance, counseling, and supervision in basic academic skills, such as reading and writing.⁵⁴ The *Peter W.* court reasoned that public policy dictated that educators do not owe a duty of care to their students, and consequently, established that an educational malpractice action for breach of the duty to educate did not exist.⁵⁵

⁴⁷ See *supra* note 2 and accompanying text; see also Note, *Educational Malpractice: D.S.W. v. Fairbanks North Star Borough School District (Alaska 1981)*, 11 UCLA ALASKA L. REV. 111, 111-18 (1981) (discussion of dissatisfaction with schools); Note, *Education and the Law: Functional Literacy Program—A Matter of Timing*, 10 STETSON L. REV. 125, 125-39 (1980) (discussion of Florida's accountability legislation and related case law involving functional literacy).

⁴⁸ Note, *Educational Malpractice: A Cause of Action in Need of a Call for Action*, 22 VAL. U. L. REV. 427, 429 (1988). See generally Loscalzo, *Liability for Malpractice in Education*, 14 J.L. & EDUC. 595 (1985) (defining the term "educational malpractice").

⁴⁹ See, e.g., cases cited *supra* note 6. See generally Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641, 713-45 (1978) (discussion of teaching as a skilled trade).

⁵⁰ Funston, *supra* note 2, at 746. See generally Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J.L. & EDUC. 479-505 (1982) (discussion of physical injury claims of malpractice versus educational negligence claims).

⁵¹ See Funston, *supra* note 2, at 746-47.

⁵² 60 Cal. App. 3d 814, 817, 131 Cal. Rptr. 854, 855 (Ct. App. 1976).

⁵³ *Id.*

⁵⁴ *Id.* at 818, 131 Cal. Rptr. at 856.

⁵⁵ See *id.* at 825, 131 Cal. Rptr. at 861.

The plaintiff in *Peter W.* alleged that because the defendant had failed to identify his reading disabilities, it had placed him in classes in which he could not read the assigned materials, and where instructors who were not geared to his reading level taught him.⁵⁶ Furthermore, the plaintiff alleged that his teachers promoted him from one grade level to the next even though they knew, or should have known, that he lacked the skills requisite for such advancement. Thus, the student in *Peter W.* claimed that the school had breached the duty of care that it owed to him. He claimed that a duty of care arose from the defendant's assumption of the function of instructing students, or the special relationship between students and their teachers.⁵⁷

Alternatively, the plaintiff alleged that the school had breached a mandatory duty under the California education code requiring parental notification of a student's progress.⁵⁸ Moreover, the plaintiff asserted that he was unable to read beyond the eighth grade level as a result of the defendant's failure to exercise the professional skill of an ordinary and prudent educator. This reading disability, the plaintiff claimed, prevented him from gaining meaningful employment, and he sought to recover damages for permanent disabilities, as well as special damages incurred for compensatory tutoring.⁵⁹ The *Peter W.* court concluded that the plaintiff's first count pled negligence, and it considered whether the elements of a tort claim existed.⁶⁰ Because the parties did not debate the adequacy of the student's claim with respect to negligence, proximate cause, and injury, the court focused on the existence of a legally recognizable duty of care. The court reasoned that public policy considerations would determine judicial recognition of a special duty of care for educators.⁶¹

The *Peter W.* court identified the relevant public policy concerns that it had to balance in deciding whether to recognize a legal duty of care and a new tort claim for education malpractice.⁶² Among these considerations were education's social utility, compared with the risks involved in its conduct, and the powers and limitations imposed on public schools. The court also stated that its ability to

⁵⁶ *Id.* at 818, 131 Cal. Rptr. at 856.

⁵⁷ *Id.* at 820-21, 131 Cal. Rptr. at 858.

⁵⁸ *Id.* at 826, 131 Cal. Rptr. at 862.

⁵⁹ *Id.* at 818, 131 Cal. Rptr. at 856.

⁶⁰ *Id.* at 819-20, 131 Cal. Rptr. at 857.

⁶¹ *See id.* at 820, 131 Cal. Rptr. at 857.

⁶² *Id.*

discern a workable rule of care for educators and to prove causation and injury affected its decision. In addition, it noted that it should consider the parties' relative ability to bear the financial burden of the injury and the available means for shifting or spreading the loss. Finally, the *Peter W.* court listed administrative considerations of feigned claims and the prospect of limitless liability as public policy concerns.⁶³ These enumerated public policy considerations, the *Peter W.* court reasoned, would determine whether the student's interests were entitled to legal protection.⁶⁴

In order to recognize a new area of tort liability, the *Peter W.* court maintained that the defendant's wrongful conduct and the resulting injury had to be recognizable and measurable within the existing legal framework.⁶⁵ Thereafter, the court reasoned that educational malfeasance and injury, unlike other negligence claims, did not afford a readily acceptable standard of care, cause or injury.⁶⁶ Pedagogy, the court concluded, was unique because it encompassed conflicting theories of conduct.⁶⁷ Furthermore, the court reasoned that because numerous subjective factors influenced a child's academic achievement, causation could not be shown with any certainty.⁶⁸ The court also reasoned that a child's inability to read and write was not injury within the meaning of negligence law.⁶⁹ In addition, the *Peter W.* court maintained that recognition of a legal duty of care and resulting liability would expose educational institutions to countless real or feigned claims, which would burden them and society with incalculable costs in public time and money.⁷⁰ Considering the public schools' role and their limited budgets, the *Peter W.* court concluded that public policy considerations negated an actionable duty of care for educators.⁷¹

⁶³ *Id.* at 823, 131 Cal. Rptr. at 860.

⁶⁴ *See id.* at 822, 131 Cal. Rptr. at 859.

⁶⁵ *Id.* at 823 & n.3, 131 Cal. Rptr. at 860 & n.3.

⁶⁶ *Id.*

⁶⁷ *See id.* at 824, 131 Cal. Rptr. at 860-61.

⁶⁸ *Id.* at 824-25, 131 Cal. Rptr. at 860-61.

⁶⁹ *Id.* at 824-25, 131 Cal. Rptr. at 861.

⁷⁰ *Id.* at 825, 131 Cal. Rptr. at 861.

⁷¹ *See id.* In addition, the *Peter W.* court considered the claimant's allegations that the school had falsely and fraudulently represented to his mother that he was performing at grade level. *Id.* at 827, 131 Cal. Rptr. at 862-63. Based on the public policy reasons already stated, the court reasoned that no cause of action existed for negligence in the form of misrepresentation, intentional or otherwise. *Id.* Absent reliance upon the misrepresentation, the *Peter W.* court held that there was no cause of action for educational misrepresentation. *Id.*

In considering the plaintiff's alternative claim that the school had breached a mandatory duty that the California education code imposed, the *Peter W.* court also held that the plaintiff had no cause of action. The court reasoned it could recognize liability for such a statutory violation only where a legislative enactment was designed to protect against the type of injury that the plaintiff claimed. Concluding that the state education code was designed to achieve optimal educational results, not to safeguard against injury, the *Peter W.* court concluded that the school had no liability resulting from its violation.⁷² Thus, the *Peter W.* court established that for public policy reasons, no common-law or statutory duty of care for educators existed, and consequently, that no cause of action in educational malpractice exists in California.

Three years after the California Court of Appeal decided *Peter W.*, the New York courts had an opportunity to decide the issue. In 1979, the New York Court of Appeals, in *Donohue v. Copiague Union Free School District*, considered a former student's claim against a school district alleging common-law educational malpractice or breach of a constitutionally imposed duty to educate.⁷³ Reasoning that the public policy concern over judicial interference in state educational policy-making was dispositive of the issue, the *Donohue* court established that New York would not recognize a cause of action for educational negligence.⁷⁴

In *Donohue*, the plaintiff alleged that his former school had breached the duty of care that it owed him when it had failed to evaluate his mental ability and capacity to comprehend subjects.⁷⁵ The student further alleged that the school failed to hire proper personnel and adopt accepted professional standards and methods to evaluate and cope with his difficulties.⁷⁶ Furthermore, he claimed that the school had graduated him, despite his failing grades and inability to master basic reading and writing skills, in violation of the New York State constitution provision requiring the legislature to provide schools for all children.⁷⁷ Thus, the plaintiff sought compensatory damages for alleged deficiencies in his knowledge.

⁷² *Id.* at 826-27, 131 Cal. Rptr. at 862.

⁷³ *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 442, 391 N.E.2d 1352, 1353, 418 N.Y.S.2d 375, 376-77 (1979), *aff'g* 64 A.D.2d 29, 407 N.Y.S.2d 874 (App. Div. 1978).

⁷⁴ *Id.* at 443-44, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 377.

⁷⁵ *Id.*

⁷⁶ *Donohue*, 64 A.D.2d at 32, 407 N.Y.S.2d at 877.

⁷⁷ *Donohue*, 47 N.Y.2d at 442, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

The trial court reasoned that the plaintiff could not sustain an action alleging negligence absent a showing that the defendant owed the plaintiff a duty of care that it breached and that proximately resulted in injury.⁷⁸ The court focused on the existence of a duty of care in the defendant and a corresponding right in the plaintiff. Reasoning that judicial recognition of a duty of care depended upon public policy principles, the *Donohue* court identified the relevant considerations.

The first category of public policy principles that the court identified was comprised of preventative considerations, including the school's ability to adopt a practical means of preventing injury, the certainty of causation, and the foreseeability of harm to the students.⁷⁹ The second category was comprised of moral considerations that arose from society's view towards the parties' relationship, the degree to which the courts should be involved in the regulation of education, and education's social utility. The final categories of public policy considerations were economic, including the defendant's ability to pay damages, and administrative, including the court's ability to cope with a possible flood of litigation and the probability of feigned claims.

Citing *Peter W.*, the *Donohue* court concluded that educators' conduct and alleged educational injuries were not comprehensible or measurable within the existing judicial framework.⁸⁰ The court adopted the rationale of *Peter W.* and concluded that there was no workable rule of care, certainty of causation, or measurable injury.⁸¹ Reasoning further that every child is born without knowledge and education, the *Donohue* court asserted that it could not characterize the lack of educational achievement as a tort injury.⁸²

In addition, the *Donohue* court maintained that courts were an inappropriate forum in which to test the efficacy of pedagogic methods. It reasoned that it was not the court's role to evaluate conflicting educational theories or to determine how to utilize scarce educational resources.⁸³ As a result, the *Donohue* court concluded that educational policy-making was the exclusive jurisdiction of state officials and was not subject to judicial oversight. It held that no

⁷⁸ *Donohue*, 64 A.D.2d at 32-33, 407 N.Y.S.2d at 877.

⁷⁹ *See id.* at 33, 407 N.Y.S.2d at 877.

⁸⁰ *Id.* at 34-35, 407 N.Y.S.2d at 878.

⁸¹ *Id.* at 37, 39, 407 N.Y.S.2d at 880-81.

⁸² *Id.*

⁸³ *Id.* at 35-36, 407 N.Y.S.2d at 879.

legal duty of care flowing from educators to their students existed, and therefore, that no claim for educational malpractice existed.⁸⁴

In response to the plaintiff's claims that the school had breached a mandatory constitutional duty to educate, the *Donohue* court also concluded that no liability existed. The court reasoned that the constitutional provisions that the plaintiff had cited were not intended to protect against ignorance.⁸⁵ The court noted that statutes that were not intended to protect against injury, but rather to confer a benefit upon the public, did not give rise to individual causes of action for their breach.⁸⁶ Stating that alternative administrative remedies for relief existed, the *Donohue* court concluded that no cause of action for negligent education could be brought under the New York constitution.

In dissent, Judge Suozzi criticized the majority's conclusion, and argued that the plaintiff's complaint had stated a valid cause of action.⁸⁷ Judge Suozzi argued that the public policy considerations that the majority cited did not mandate a dismissal of the complaint.⁸⁸ Reasoning that educational malpractice claims were no different than other forms of negligence, he argued that proof of causation and injury were questions to be resolved at trial. Judge Suozzi also asserted that if the school had failed to adopt accepted testing, diagnostic, and remedial procedures, it should be subjected to a malpractice action.⁸⁹ He further reasoned that New York's abolition of sovereign immunity refuted the court's fear of a flood of litigation, which in any event, was insufficient reason to differentiate between educational malpractice and other forms of negligence.⁹⁰ As an example, he noted that the courts have accepted environmental claims that often involved complex issues of proof and resulted in multiple lawsuits.⁹¹

Alternatively, Judge Suozzi argued that in graduating the plaintiff in *Donohue*, the school had seemingly breached a mandatory statutory duty.⁹² He pointed to New York educational regulations that required that all state diploma recipients satisfactorily complete

⁸⁴ See *id.* at 31, 407 N.Y.S.2d at 876.

⁸⁵ *Id.* at 37, 407 N.Y.S.2d at 881.

⁸⁶ *Id.* at 37-38, 407 N.Y.S.2d at 881.

⁸⁷ See *id.* at 39, 407 N.Y.S.2d at 882 (Suozzi, J., dissenting).

⁸⁸ *Id.* at 41, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

⁸⁹ See *id.* at 44, 407 N.Y.S.2d at 884-85 (Suozzi, J., dissenting).

⁹⁰ See *id.* at 41-42, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

⁹¹ *Id.* at 42, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

⁹² See *id.* at 44, 407 N.Y.S.2d at 884 (Suozzi, J., dissenting).

a four year course of study, and that all school boards evaluate their pupils.⁹³ The plaintiff's failing grades, he concluded, were evidence that the school had violated stated educational standards.⁹⁴ Thus, Judge Suozzi argued that the plaintiff in *Donohue* had stated a negligence cause of action by describing the school's violation of professional and statutory standards of conduct.

The New York Court of Appeals affirmed the lower *Donohue* court's holding and refused to recognize a cause of action for either educational malpractice, or breach of a constitutionally imposed duty to educate.⁹⁵ The *Donohue* court reasoned that although it could imagine a theoretical claim for educational malpractice, as a matter of public policy, it could not recognize the action.⁹⁶ Consequently, the *Donohue* court established that public policy considerations dictated dismissal of educational malpractice actions in New York.⁹⁷

Courts confronted with subsequent claims of educational negligence have adopted the public policy balancing test of the *Peter W.* and *Donohue* courts in the context of a variety of fact patterns.⁹⁸ Preventative, moral, economic, and administrative public policy considerations have affected the outcome of educational malpractice claims whether the defendant's actions were misfeasance or nonfeasance,⁹⁹ or the defendant was a private or public school,¹⁰⁰ or other agency.¹⁰¹ Thus, concern over the difficulty of proving a

⁹³ *Id.* at 43-44, 407 N.Y.S.2d at 884 (Suozzi, J., dissenting).

⁹⁴ *See id.* at 42, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

⁹⁵ *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377.

⁹⁶ *Id.* at 444, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

⁹⁷ *Id.* at 444-45, 391 N.E.2d at 1354-55, 418 N.Y.S.2d at 377-78. *See generally* Note, *Donohue v. Copiague Union Free School District: New York Chooses Not to Recognize "Educational Malpractice,"* 43 ALB. L. REV. 339, 339-59 (1979).

⁹⁸ *See, e.g.,* *Torres v. Little Flower Children's Servs.*, 64 N.Y.2d 119, 126, 474 N.E.2d 223, 226, 485 N.Y.S.2d 15, 18 (1984) (defendant was public guardian), *cert. denied*, 474 U.S. 864 (1985); *Hoffman v. Board of Educ.*, 49 N.Y.2d 121, 126, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 378 (1979); *Helm v. Professional Children's School*, 103 Misc. 2d 1053, 1053-54, 431 N.Y.S.2d 246, 246-47 (App. Div. 1980) (private school).

⁹⁹ *See, e.g., Hoffman*, 49 N.Y.2d at 126, 400 N.E.2d at 320, 424 N.Y.S.2d at 378. *See infra* notes 264-74 and accompanying text for a discussion of the *Hoffman* decision. "Misfeasance" is the improper performance of some act which a person may lawfully do and "nonfeasance" is the omission of an act which a person ought to do. BLACK'S LAW DICTIONARY 1000 (5th ed. 1979).

¹⁰⁰ *E.g., Palandino v. Adelphi Univ.*, 89 A.D.2d 85, 89-90, 454 N.Y.S.2d 868, 871-72 (App. Div. 1981). *See infra* notes 174-83 and accompanying text for a discussion of the *Palandino* decision.

¹⁰¹ *Torres*, 64 N.Y.2d at 123, 474 N.E.2d at 224, 485 N.Y.S.2d at 18. *See infra* notes 184-92 and accompanying text for a discussion of the *Torres* decision.

standard of care, causation, and injury has influenced some court decisions.

Other courts, like those in *Peter W.* and *Donohue*, have expressed concern over judicial interference, and the possible fiscal impact of new tort liability.¹⁰² Although no one court has focused on all of these issues, each court had discussed one or more of the public policy concerns. The following section will lay out the reasoning courts have adopted in considering whether to recognize an action in educational malpractice within the framework of the four *Donohue* categories.

II. CONSIDERING AND BALANCING THE ELEMENTS OF PUBLIC POLICY

In *Donohue v. Copiague Union Free School District*, the New York Supreme Court, Appellate Division, identified four public policy categories affecting recognition of an educational malpractice claim.¹⁰³ The *Donohue* court stated that courts had to balance preventative, moral, economic, and administrative considerations before they could recognize a duty of care flowing from educators to their students. Subsequent courts that have confronted educational negligence claims have focused on one or more of these identified considerations.

A. Preventative Considerations: Demonstrating a Standard of Care, Proximate Cause and Injury

In *Donohue*, the New York Supreme Court, Appellate Division, identified a number of preventative considerations affecting the recognition of a duty of care, and thus, an educational malpractice cause of action.¹⁰⁴ These considerations included: whether a practical, proper course existed to prevent injury that the defendant could adopt (existence of a workable standard of care); concerns over the difficulty of showing proximate cause; and the foreseeability of the plaintiff's injury.¹⁰⁵ Courts that have focused their discussions of recognition of educational negligence claims on preventative considerations of public policy have fallen into one or more of these three subcategories.

¹⁰² See *infra* notes 260-91, 303-18 and accompanying text.

¹⁰³ 64 A.D.2d 29, 33, 407 N.Y.S.2d 874, 877 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

1. Existence of a Workable Standard of Care

The first element of preventative public policy concerns is the judicial system's ability to identify a workable standard of care against which to measure an educator's conduct.¹⁰⁶ Plaintiffs alleging educational malpractice in public schools have attempted to demonstrate that either the conduct of other educators¹⁰⁷ or the provisions of state legislation¹⁰⁸ define an educational standard of care. Alternatively, claimants against private educational institutions have alleged that contractual terms defined the standard of care.¹⁰⁹

a. *Common Law Standard of Care*

Plaintiffs alleging educational malpractice have sought to prove that teachers, like other professionals, should be held to a higher professional standard of care than ordinary persons in their conduct.¹¹⁰ Plaintiffs have asked courts to look to the conduct of other

¹⁰⁶ *Id.* at 33, 407 N.Y.S.2d at 877; see also *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (Ct. App. 1976).

¹⁰⁷ See, e.g., *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856 (plaintiff alleged that defendant failed to exercise skill of ordinary prudent educator); *Donohue*, 64 A.D.2d at 32, 407 N.Y.S.2d at 877 (plaintiff alleged that defendant failed to adopt the accepted professional standards and methods). See generally *Funston*, *supra* note 2, at 779-84.

¹⁰⁸ See, e.g., *Tirpak v. Los Angeles Unified School Dist.*, 187 Cal. App. 3d 639, 640, 232 Cal. Rptr. 61, 62 (Ct. App. 1986) (student cited California constitution and accompanying education code in his action against school district alleging violation of the suspension and expulsion provisions); *Rubio v. Carlsbad Mun. School Dist.*, 106 N.M. 446, 448-49, 744 P.2d 919, 921 (1987) (students cited New Mexico constitution and accompanying legislation in their action against school district alleging failure to obtain an adequate education from a drug using teacher); *Agostine v. School Dist. of Philadelphia*, 527 A.2d 193, 195-96 (Pa. Commw. Ct. 1987) (learning disabled student cited public school code in her action alleging the school district improperly placed her in a class for the mentally retarded); *Lindsay v. Thomas*, 465 A.2d 122, 123-24 (Pa. Commw. Ct. 1983) (learning disabled student cited public school code in his action against school district alleging failure to identify special needs student and to educate); *Camer v. Seattle School Dist. No.1*, 52 Wash. App. 531, 536, 762 P.2d 356, 359 (Ct. App. 1988) (student cited Washington Basic Education Act in action against school district alleging failure to teach state constitution and provide optimum learning atmosphere).

¹⁰⁹ See cases cited *supra* note 8; see also *Swidryx v. St. Michael's Medical Center*, 201 N.J. Super. 601, 603, 493 A.2d 641, 642 (Super. Ct. App. Div. 1985) (physician involved in medical malpractice claim brought action against former medical school alleging that school failed to provide him with a suitable environment for a medical educational experience); *Palandino v. Adelphi Univ.*, 89 A.D.2d 85, 86, 454 N.Y.S.2d 868, 869-70 (App. Div. 1982) (parents sued private elementary school seeking damages sustained as a result of alleged breach of contract to provide a quality education to their child); *Malone v. Academy of Court Reporting*, No. 90AP-264, 90AP-430 (Ohio App. Dec. 31, 1990) (LEXIS, States library, Omni file) (students sued paralegal institute for fraud and breach of contract).

¹¹⁰ See, e.g., *Peter W.*, 60 Cal. App. 3d at 818, 131 Cal. Rptr. at 856; *Donohue*, 64 A.D.2d at 32, 407 N.Y.S.2d at 877.

professional educators to define a common-law standard of care. Where teachers have violated accepted pedagogic practices, these plaintiffs have contended that a duty of care has been breached, and that consequently, courts should find liability. In response to these allegations, courts have focused their debate over the existence of an educational standard of care on the extent to which education is similar to other professions currently subjected to malpractice claims.¹¹¹

Those courts that have refused to find a standard and duty of care for educators have reasoned that education is unlike other professions in that it involves the interaction of many economic, social, and philosophical factors.¹¹² Because the science of pedagogy is abstract and complex, these courts have reasoned that a professional standard of care cannot be applied to educators. For example, in 1989, the United States District Court, for the Northern District of California, in *Swany v. San Ramon Valley Unified School District*, considered a student's civil rights, breach of contract, and negligent infliction of emotional distress claims against his school for unreasonably withholding his diploma, and held that no cause of action existed.¹¹³ Citing *Peter W.*, the *Swany* court reasoned that California law required only that teachers act as would reasonably prudent persons in like circumstances, and thus, the court stated that California law did not recognize a higher professional standard of conduct for educators.¹¹⁴ Where a school had not breached the reasonable person standard, the *Swany* court established that no claim of negligence could be allowed.¹¹⁵

As suggested by the *Swany* court, one commentator argues that application of a higher professional standard to teachers is inherently inappropriate.¹¹⁶ He asserts that unlike lawyers and medical personnel, teachers possess no well-defined technical knowledge, and thus, there is reason to doubt their professionalism.¹¹⁷ Furthermore, he asserts that the only people who perceive educators as professionals are educators, and consequently, pedagogic meth-

¹¹¹ See, e.g., *Peter W.*, 60 Cal. App. 3d at 824-25, 131 Cal. Rptr. at 854-55.

¹¹² See, e.g., *id.* at 824-25, 131 Cal. Rptr. at 854-55; see also *Hunter v. Board of Educ. of Montgomery County*, 47 Md. App. 709, 716, 425 A.2d 681, 685 (Ct. Spec. App. 1981), modified, 439 A.2d 582 (1982).

¹¹³ 720 F. Supp. 764, 781-82 (N.D. Cal. 1989).

¹¹⁴ *Id.* at 780.

¹¹⁵ See *id.* at 781.

¹¹⁶ See Funston, *supra* note 2, at 779.

¹¹⁷ *Id.* at 774.

ods do not lend themselves to standardization. Because educators have no minimum level of technical skill, and standardization of the educational process is impossible, he concludes that a professional standard of care for educators cannot be established.¹¹⁸

In determining whether a common-law professional standard of care for educators exists, courts have focused not only on the unique qualities of the educational profession, but also on the perceived inability of triers of fact to address such qualities.¹¹⁹ In other words, courts have reasoned that education's collaborative process is radically different from other professions, and therefore, that education is simply too difficult for jurors to understand. Because they have concluded that the proof or disproof of educational negligence is so difficult, these courts have refused to allow a cause of action for educational malpractice.¹²⁰

For example, in *Donohue*, the New York Supreme Court, in considering a claim that a school district had not adopted accepted professional standards, reasoned that triers of fact would not be able to decide which educational policies the school should have pursued and which it should have avoided.¹²¹ Citing *Peter W.*, the *Donohue* court reasoned that the creation of an educational standard of care would require courts and juries to evaluate educators' sociological, psychological and educational assumptions.¹²² Concluding that such judicial review was unacceptable, the *Donohue* court held that the school did not owe a duty of care to its students.¹²³

A year later, in 1979, the California Court of Appeal, in *Smith v. Alameda County Social Services Agency*, reinforced the notion that triers of fact are too unsophisticated to be entrusted with the creation of a standard of care in educational claims that involve the review of a defendant's subjective decision-making.¹²⁴ In *Smith*, the plaintiff alleged that a social services agency had negligently failed

¹¹⁸ See *id.*

¹¹⁹ See, e.g., *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 35, 407 N.Y.S.2d 874, 879 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). See generally Funston, *supra* note 2, at 779 (discussion of complexities inherent in establishing a community standard for educators); Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 429-34 (1973) (courts' lack of knowledge about the factors affecting education would no longer be a valid reason for judicial noninterference if the right empirical advances were made).

¹²⁰ See, e.g., *Donohue*, 64 A.D.2d at 35, 407 N.Y.S.2d at 879.

¹²¹ *Id.*

¹²² *Id.* at 35-36, 407 N.Y.S.2d at 879-80.

¹²³ *Id.* at 35, 407 N.Y.S.2d at 878.

¹²⁴ 90 Cal. App. 3d 929, 936-37, 153 Cal. Rptr. 712, 715-16 (Ct. App. 1979).

to take reasonable action to bring about his adoption, and that a school district had negligently placed him in classes for the mentally retarded when he was not retarded.¹²⁵ The plaintiff in *Smith* asserted that he was the expressed beneficiary of an agreement between his mother and the agency that promised that it would take reasonable efforts to have him educated and adopted.¹²⁶

The *Smith* court reasoned that an educational contract claim raised the same insurmountable problems of causation and injury as a tort claim, and that no clear or manageable standard existed for assessing the wrongfulness of the agency's or the educator's conduct.¹²⁷ Citing *Peter W.*, the *Smith* court further reasoned that requiring a trier of fact to exercise hindsight over years of social work, involving difficult and partially subjective decisions, would result in a highly speculative inquiry.¹²⁸ Consequently, the *Smith* court held that the agency and school district did not owe the student a duty of care, and thus, that no liability existed.¹²⁹

One commentator suggests that courts are acutely aware of their own lack of expertise in the complex emotional issues that educational malpractice claims raise.¹³⁰ He asserts that this perceived incompetence factors into their conclusion that no educational standard of care is legally recognizable.¹³¹ Courts believe, he concludes, that career teachers and school administrators are more qualified than courts to formulate educational policy.¹³²

Although some courts have justified nonrecognition of educational negligence claims because of the difficulties inherent in establishing a standard of care for educators, other courts have suggested that defining such a standard is not impossible. For example, the New York Court of Appeals, in *Donohue*, stated in dicta that it could imagine a legal duty of care flowing from professional educators to their students.¹³³

¹²⁵ *Id.* at 933-34, 941, 153 Cal. Rptr. at 714.

¹²⁶ *Id.* at 942, 153 Cal. Rptr. at 719.

¹²⁷ *Id.* at 936-37, 153 Cal. Rptr. at 715-16.

¹²⁸ *Id.* at 936-37, 153 Cal. Rptr. at 715-16.

¹²⁹ *Id.* at 941-42, 153 Cal. Rptr. at 718-19.

¹³⁰ Funston, *supra* note 2, at 793.

¹³¹ *See id.* at 793 n.234.

¹³² *See id.* at 798.

¹³³ *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353, 418 N.Y.S.2d 375, 377 (1979); *see also Hoffman v. Board of Educ. of New York*, 64 A.D.2d 369, 385, 410 N.Y.S.2d 99, 110 (App. Div. 1978) (stating that educational negligence that is like medical negligence can be proven at trial), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S. 2d 376 (1979).

Moreover, some arguments in dissent have asserted that plaintiffs could prove an educational standard of care at trial in the same manner as other professional standards of conduct.¹³⁴ For instance, in 1982, the Maryland Court of Appeals, in *Hunter v. Board of Education of Montgomery County*, held that a student had no cause of action in his educational malpractice claim alleging that his school had failed to teach him properly.¹³⁵ The plaintiff in *Hunter* alleged that the school had negligently evaluated his learning abilities, and thus, had caused him to repeat the first grade while physically placing him in the second grade. The *Hunter* court reasoned that it could not establish causation or measure educational injury.¹³⁶ It further reasoned that recognition of the cause of action would improperly position the courts as overseers of the state educational process. Thus, because it concluded that more appropriate administrative remedies for educational disputes were available, the *Hunter* court ruled against any civil remedy for educational negligence.¹³⁷

In dissent, however, Judge Davidson further developed the *Donohue* sentiment that one could establish a standard of care in educational tort claims.¹³⁸ Judge Davidson argued that courts have consistently recognized non-educational professional malpractice claims that involved a variety of uncertainties. Moreover, Judge Davidson argued that public educators, like lawyers and medical personnel, are specially trained certified professionals who hold themselves out as possessing certain skills and knowledge that non-professionals do not share.¹³⁹

Judge Davidson maintained that education is no different from medicine or law in that each profession encompasses differing theories of conduct, and requires professional judgment.¹⁴⁰ Thus, he argued, courts should judge educators according to the particular methodology of their profession in the same manner that courts judge physicians and lawyers. Finally, Judge Davidson concluded that educators, as professionals, owe a professional duty of care to

¹³⁴ See *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 589 (Md. 1982) (Davidson, J., concurring in part and dissenting in part). See generally Note, *supra* note 5, at 582-95.

¹³⁵ 439 A.2d at 583.

¹³⁶ *Id.* at 585.

¹³⁷ *Id.* at 586.

¹³⁸ See *id.* at 589 (Davidson, J., concurring in part and dissenting in part).

¹³⁹ *Id.* at 588-89 (Davidson, J., concurring in part and dissenting in part).

¹⁴⁰ *Id.* (Davidson, J., concurring in part and dissenting in part).

their students, and that a standard of care based upon customary conduct was appropriate.¹⁴¹

This standard of care suggested by Judge Davidson, one commentator argues, is possible to establish in light of currently available empirical evidence on pedagogical methods.¹⁴² Studies of testing formats and instructional methodology, he asserts, can supply courts with the evidence necessary to establish and define educational schools of conduct.¹⁴³ Once defined, he concludes, courts could use these schools of thought to evaluate an educator's conduct in an educational malpractice action.¹⁴⁴

In sum, the debate over whether a common-law duty and standard of care for educators exists has led courts to examine the professional nature of educators and their pedagogical methods. Courts have understood the ease or difficulty of defining a legal standard for educational malpractice claims as a function of their ability to understand and evaluate the teaching vocation. Those courts that have viewed teaching as a unique process unlike other professions have held that no workable common-law standard of care exists. Those majority and minority opinions that have perceived educators as similar to other professionals have concluded that plaintiffs can prove a standard of care at trial.

b. *Statutorily Defined Standard of Care*

As an alternative to a common-law professional standard of conduct, plaintiffs have argued that courts can find a duty and standard of care for educators in state constitutional or legislative language.¹⁴⁵ Generally, courts have held that a plaintiff can plead a tort claim for statutory violation, if he or she is a member of the class of persons that the statute was designed to protect, and if the injury suffered was the type that the statute was designed to pre-

¹⁴¹ *Id.*; see also *Myers v. Medford Lakes Bd. of Educ.*, 199 N.J. Super. 511, 515-16, 489 A.2d 1240, 1242 (Super. Ct. App. Div. 1985) (stating in dicta that if courts recognized educational malpractice in New Jersey, the relevant standard of care would be that conduct prevailing among professional educators).

¹⁴² See Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 800-09 (1985) (argues that unsuccessful schools that fail to teach students basic skills should be required to adopt more effective alternative methods of instruction).

¹⁴³ See *id.* at 803-04.

¹⁴⁴ See *id.* at 851-60.

¹⁴⁵ See cases cited *supra* note 108.

vent.¹⁴⁶ Consequently, courts deciding educational negligence claims based on a statutory violation have reviewed the legislative history of education legislation to determine if it provides for a tort cause of action.¹⁴⁷

After reviewing the legislative history, some courts and justices have concluded that state education legislation can define a standard and duty of care for educators in the context of educational malpractice actions. For example, in 1982, the Montana Supreme Court, in *B.M. v. State*, considered a claim alleging misplacement of a child in a special education program, and refused to grant summary judgment in favor of the defendant school.¹⁴⁸ Reasoning that the school owed a duty of care to test and place the child properly, the *B.M.* court held that the school could be held liable if it had breached that duty.¹⁴⁹

In *B.M.*, an outside psychologist had tested the plaintiff while the child was in kindergarten, upon the recommendation of the superintendent of schools.¹⁵⁰ The psychologist recommended that the child repeat kindergarten or receive special educational help. After deciding to seek state funds for a special education program for the plaintiff and other first graders, the school submitted an application and plan to the superintendent outlining the children's needs.¹⁵¹ Subsequently, the school implemented an approved program for the team teaching of integrated classes. The plaintiffs alleged, however, that after five weeks the program had been changed and the children had been segregated to a separate room without their parents' knowledge. The plaintiff's parents learned of the change nine weeks later, and removed the child from the

¹⁴⁶ See, e.g., *Keech v. Berkeley Unified School Dist.*, 162 Cal. App. 3d 464, 469, 210 Cal. Rptr. 7, 9 (Ct. App. 1984) (handicapped student claimed that her school negligently applied for special education services for her). Prosser and Keeton also note that when a statute or administrative regulation provides for certain actions, a court can interpret it as fixing a standard of behavior for members of the community. For a court to find a statutory legal duty, a plaintiff must show that he or she is in the class of persons protected by the statute and that he or she suffered a harm that the legislation contemplated. Some statutes are designed merely to protect public interests and do not contemplate remedies for all injuries. PROSSER & KEETON, *supra* note 35, at 220-23.

¹⁴⁷ See, e.g., *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 377 (1979).

¹⁴⁸ *B.M. v. State*, 200 Mont. 58, 59-60, 649 P.2d 425, 427-28 (1982).

¹⁴⁹ *Id.* at 63-64, 649 P.2d at 427-28.

¹⁵⁰ *Id.* at 60, 649 P.2d at 426-27.

¹⁵¹ *Id.* at 61, 649 P.2d at 426-27.

program.¹⁵² The plaintiffs claimed that their child had suffered developmental setbacks as a result of the defendant's conduct.¹⁵³

In support of its refusal to grant the defendant school's motion for summary judgment, the *B.M.* court reasoned that absent any public policy requirement limiting liability, the state constitution permitted an action for negligence against a school board.¹⁵⁴ The court reasoned that article X of the Montana State constitution mandated an educational system that would develop equally the full potential of the state's students, and thereby, created a mandatory duty and standard of care for public educators. The *B.M.* court concluded that article X, combined with state legislation requiring mandatory school attendance and a special education handbook on administering special education programs, sufficiently defined a duty of care that educators owed to special education students.¹⁵⁵

In its rejection of the lower court's ruling that no legal duty of care existed, the *B.M.* court reasoned that the plaintiff was in the class of persons protected by the statutory provisions for special education.¹⁵⁶ Furthermore, the *B.M.* court concluded that the school's failure to test and place the child in accordance with legislated standards could subject it to liability.¹⁵⁷ Although the *B.M.* court did not rule on whether the school had breached the duty of care or whether the plaintiff had suffered injury, the court did hold that the state constitution mandated a duty of care to special needs students.¹⁵⁸ Thus, the *B.M.* court established that a duty of care can be derived from state constitutional language.

¹⁵² *Id.* at 61-62, 649 P.2d at 426-27.

¹⁵³ *Id.* at 62, 649 P.2d at 426-27.

¹⁵⁴ *Id.* at 63, 649 P.2d at 427.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* In 1990, the Montana Supreme Court, in *Hayworth v. School Dist. No. 1*, considered parents' claim alleging that school board officials failed to provide a safe educational environment for students in violation of article X of the Montana constitution. The plaintiffs alleged that they had been forced to remove their child from the defendant's school because of physical and verbal altercations. The court concluded that a new construction of article X since *B.M.* dictated that immunity barred the plaintiffs' claim. *Hayworth*, 795 P.2d 470, 471-73 (Mont. 1990).

¹⁵⁸ *B.M.*, 200 Mont. at 63-64, 649 P.2d at 427-28; *see also* *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 42, 407 N.Y.S.2d 874, 883-84 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979) (Suozi, J., dissenting) (arguing that New York regulations requiring state diploma recipients to complete a four year course of study satisfactorily could be used as an educational standard); *Walker v. Board of Educ. of Olean City School Dist.*, 78 A.D.2d 982, 983, 433 N.Y.S.2d 660, 661 (App. Div. 1980) (stating in dicta that where a statutory or constitutional provision is the basis of an educational malpractice claim, review of the school board's decisions is proper).

One commentator suggests that legislative accountability standards for educators exist, and courts can use them in educational malpractice claims.¹⁵⁹ Such legislated accountability programs, he argues, attempt to quantify precisely a standard of care for educators in order to protect school children from the effects of careless teaching. Thus, he asserts that accountability programs define concrete obligations that courts could use to establish educator liability in malpractice actions.¹⁶⁰

In contrast, although some courts have reasoned that state statutes are a basis for an educator's duty or standard of care, other courts have reasoned that states never intended educational legislation to support civil claims against school systems.¹⁶¹ For example, in 1977, the Illinois Supreme Court, in *Pierce v. Board of Education of Chicago*, held that a student's claim that his school had failed to place him in a special education program in violation of the state's constitution did not state a cause of action.¹⁶² The court reasoned that the statutory language promoting educational development of all persons was not self-executing, and stated that additional legislation was required before the court could conclude that it established a mandatory duty.¹⁶³ Therefore, the court concluded that the state constitution's pronouncement was merely a statement of general policy, and not a mandate that could create tort liability. The court also noted that alternative statutory review procedures were available, which the plaintiff had failed to pursue, and thus, the court concluded that the plaintiff had not exhausted the administrative remedies.¹⁶⁴ Thus, the *Pierce* court established that not all legislative education enactments are intended to be a basis for civil negligence claims against educators.

Similarly, in 1981, the Alaska Supreme Court, in *D.S.W. v. Fairbanks North Star Borough School District*, held that claims alleging that a school had negligently classified, placed, and taught the plain-

¹⁵⁹ See Valdes, *supra* note 2, at 283-84.

¹⁶⁰ See *id.* See generally Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 413-16. (1990) (discussing the existence of minimum standards legislation as a basis for court-enforced implementation).

¹⁶¹ See, e.g., *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1353, 418 N.Y.S.2d at 377; see also *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 826-27, 131 Cal. Rptr. 854, 862 (Ct. App. 1976); *Pierce v. Board of Educ. of Chicago*, 69 Ill. 2d 89, 92-93, 370 N.E.2d 535, 536 (1977).

¹⁶² See 69 Ill. 2d at 94, 370 N.E.2d at 537.

¹⁶³ *Id.* at 92-93, 370 N.E.2d at 536.

¹⁶⁴ *Id.* at 94, 370 N.E.2d at 537.

tiffs did not state a cause of action.¹⁶⁵ The plaintiffs in *D.S.W.*, who suffered from dyslexia, alleged that the defendant had negligently terminated their special education courses in violation of Alaska's Education for Exceptional Children Act.¹⁶⁶ As a result, the plaintiffs claimed that they had suffered a loss of education, a loss of employment opportunity, a loss of opportunity to attend college, a loss of earning ability, and mental anguish.¹⁶⁷ Citing *Peter W. and Smith*, the *D.S.W.* court reasoned that, because it was impossible to determine the children's academic success absent the defendants' conduct, the court was not able to determine legal causation.¹⁶⁸ In rejecting the plaintiffs' claim, the *D.S.W.* court concluded that because the legislation provided for alternative administrative remedies, it did not authorize a claim for monetary damages.¹⁶⁹ Thus, the *D.S.W.* court established that some education statutes do not provide for civil action, and thus, monetary damages are an inappropriate remedy for some educational injuries.¹⁷⁰

Thus, the courts that have considered the alternative argument that they can derive a legal standard for educators from state constitutional or statutory language have focused on legislative design. Where they can determine that legislation protects children from educational injuries, courts may reason that a duty of care exists for education that, if breached, could result in tort liability. On the other hand, if the legislature did not contemplate civil action and a statute is purely administrative, courts have concluded that no duty of care exists for educators, and thus, the court cannot sustain educational malpractice claims.

c. *Contractual Standard of Care*

The third alternative theory for the source of a standard and duty of care for educators is in contract law. Students claiming educational injury while attending private institutions have claimed

¹⁶⁵ 628 P.2d 554, 554 (Alaska 1981).

¹⁶⁶ *Id.* at 554-55.

¹⁶⁷ *Id.* at 554.

¹⁶⁸ *Id.* at 556.

¹⁶⁹ See *id.* at 556-57; see also *Keech v. Berkeley Unified School Dist.*, 162 Cal. App. 3d 464, 469, 210 Cal. Rptr. 7, 9 (Ct. App. 1984) (California education code was not designed to protect students from monetary expenses of special education and sufficient alternative administrative procedures were available); *Lindsay v. Thomas*, 465 A.2d 122, 124 (Pa. Commw. Ct. 1983) (court concluded that monetary damages were unnecessary because other remedies were available to ensure school compliance with the public school code).

¹⁷⁰ See *Keech*, 162 Cal. App. 3d at 469, 210 Cal. Rptr. at 9; *Lindsay*, 465 A.2d at 124.

that a court can measure their school's conduct against the terms of their contract with the school.¹⁷¹ These plaintiffs have argued that a school's breach of the terms of their education contracts demonstrates educational negligence and should result in liability. In response to these claims, some courts have concluded that contract claims alleging educational negligence are no different from tort claims, and thus, have refused to recognize the contract claim on public policy grounds.¹⁷² Other courts have recognized these contract actions, reasoning that they require less judicial speculation, and therefore, are capable of judicial review.¹⁷³

The first few breach of contract claims which were brought against private educational institutions met with little success. For example, in 1982, the New York Supreme Court, Appellate Division, in *Palandino v. Adelphi University*, held that a student's claim for breach of contract and fraudulent misrepresentation against his elementary school stated no cause of action.¹⁷⁴ After seven years at the defendant's school, the plaintiff had evidenced learning problems, and had been sent to a private testing facility that had determined that he did not have grade level reading and math skills.¹⁷⁵ The plaintiff alleged that after the testing, the defendant had failed to promote him, and that consequently, he had been forced to repeat his grade in public school. The court reasoned that, as with tort claims, educational malpractice contract claims required unwarranted judicial interference in educational policy-making.¹⁷⁶ Concluding that professional educators, not judges, were responsible for determining educational methodology, the *Palandino* court held that no contract action for educational negligence existed in New York.¹⁷⁷

The trial court reasoned that the defendant's conduct in *Palandino* had not been discretionary, and therefore, it was subject to judicial review.¹⁷⁸ Noting that an educator-student relationship was

¹⁷¹ See, e.g., *Swidryx v. St. Michael's Medical Center*, 201 N.J. Super. 601, 603, 493 A.2d 641, 642 (Super. Ct. App. Div. 1985); *Palandino v. Adelphi Univ.*, 89 A.D.2d 85, 86, 454 N.Y.S.2d 868, 869-70 (App. Div. 1982); *Malone v. Academy of Court Reporting*, No. 90AP-264, 90AP-430 (Ohio App. Dec. 31, 1990) (LEXIS, States library, Omni file).

¹⁷² See *infra* notes 174-92 and accompanying text.

¹⁷³ See *infra* notes 193-211 and accompanying text.

¹⁷⁴ 89 A.D.2d 85, 86, 454 N.Y.S.2d 868, 869-70 (App. Div. 1982), *reversing* 110 Misc. 2d 314, 442 N.Y.S.2d 38 (Sup. Ct. 1981).

¹⁷⁵ *Id.* at 86, 454 N.Y.S.2d at 870.

¹⁷⁶ *Id.* at 91-93, 454 N.Y.S.2d at 872-73.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* at 315, 442 N.Y.S.2d at 39.

one-sided, the court reasoned that it should not provide educational institutions with a safe haven from liability for their wrongful conduct.¹⁷⁹ Thus, the trial court found that the school had knowingly and wrongfully deprived the student, and therefore, it could be held liable for its conduct.¹⁸⁰

On appeal, however, the New York Supreme Court, Appellate Division, concluded that judicial non-interference in education was a sound policy even when a claim was against a private institution.¹⁸¹ Concluding that the plaintiff's claim required an analysis of the defendant's educational function, the court refused to review the school's conduct.¹⁸² Thus, *Palandino* established that when a private educational institution's discretionary decision-making is the basis of an educational negligence contract claim, public policy dictates that no judicial review is permissible.¹⁸³ Nevertheless, the lower court's reasoning demonstrates that some courts have considered contract claims for educational misconduct more justiciable than their tort counterparts.

According to the New York courts, the public policy rationale for denying breach of contract educational negligence claims is equally applicable where the defendant is a public guardian acting in response to an educator's conduct. For example, in 1984, the New York Court of Appeals, in *Torres v. Little Flower Children's Services*, considered a functionally illiterate plaintiff's educational malpractice claim against the New York City's Department of Social Services ("DSS"), and a child care agency, and held that because of public policy concerns the plaintiff had no cause of action.¹⁸⁴

The plaintiff in *Torres*, abandoned at seven by his mother and placed with DSS, alleged that after DSS had placed him with the child care agency, the agency had assumed a contractual obligation to provide him with an education.¹⁸⁵ The plaintiff alleged that at the time the agency had him tested and enrolled him in public school it had known that he did not speak English and that he had

¹⁷⁹ *Id.* at 315, 442 N.Y.S.2d at 38.

¹⁸⁰ *See id.* at 315-16, 442 N.Y.S.2d at 39.

¹⁸¹ *Palandino*, 89 A.D.2d at 89, 454 N.Y.S.2d at 871-72.

¹⁸² *See id.* at 92-93, 454 N.Y.S.2d at 873.

¹⁸³ *See id.* at 89-92, 454 N.Y.S.2d at 872-73; *see also* *Poe v. Hamilton*, 56 Ohio App. 3d 137, 139, 565 N.E.2d 887, 889 (1990) (stating that the professional judgment of educators in determining appropriate methods of teaching should not be disturbed).

¹⁸⁴ 64 N.Y.2d 119, 124-25, 474 N.E.2d 223, 225, 485 N.Y.S.2d 15, 16 (1984), *cert. denied*, 474 U.S. 864 (1985).

¹⁸⁵ *Id.* at 123, 474 N.E.2d at 224, 485 N.Y.S.2d at 17.

a learning disability.¹⁸⁶ He also alleged that despite this knowledge, and against a social worker's advice, the agency had failed to supervise his testing and placement properly.¹⁸⁷ Finally, the plaintiff alleged that DSS had violated New York social services and education laws requiring it to care for abandoned children, and that the agency had violated its common-law duty as guardian.¹⁸⁸

In holding that neither defendant was liable, the *Torres* court reasoned that it could not review educators' discretionary decision-making.¹⁸⁹ Citing *Donohue*, the court concluded that although a tort claim for educational malpractice was theoretically possible, it had to fail because of public policy concerns.¹⁹⁰ The *Torres* court stated that although students had the right to question educators' choices, this right did not give rise to negligence claims.¹⁹¹ Thus, *Torres* established that legal custodians, acting in response to educators' discretionary judgments, cannot be held liable for educational negligence or breach of educational contract in New York.¹⁹²

In contrast, some courts have concluded that claims alleging educational negligence as a breach of contract provide objective standards for determining what conduct constituted due care for educators, and thus, are permissible. For example, in 1981, the California Court of Appeal, Fourth District, in *County of Riverside v. Loma Linda University*, considered a county's indemnification action against a medical school for educational negligence, and held that the plaintiff's cause of action was permissible.¹⁹³ In *Riverside*, the county claimed that the medical school had been negligent in discharging its obligations under an affiliation agreement, which provided that the university would furnish its faculty's teaching services to the county hospital to educate and train its medical personnel.¹⁹⁴

¹⁸⁶ See *id.* at 123-24, 474 N.E.2d at 224, 485 N.Y.S.2d at 16.

¹⁸⁷ See *id.* at 124-25, 474 N.E.2d at 224-25, 485 N.Y.S.2d at 16-17.

¹⁸⁸ See *id.* at 125-26, 474 N.E.2d at 225-26, 485 N.Y.S.2d at 17-18.

¹⁸⁹ See *id.* at 126-27, 474 N.E.2d at 226, 485 N.Y.S.2d at 18-19.

¹⁹⁰ *Id.* at 128, 474 N.E.2d at 227, 485 N.Y.S.2d at 19.

¹⁹¹ *Id.* at 127-28, 474 N.E.2d at 226-27, 485 N.Y.S.2d at 18; see also *Smith v. Alameda County Social Servs. Agency*, 90 Cal. App. 3d 929, 942-43, 153 Cal. Rptr. 712, 719 (Ct. App. 1979) (court stated that the plaintiff's claim alleging breach of contract to educate as an expressed beneficiary was subject to the same problems as negligence actions, and thus, was not recognizable).

¹⁹² *Id.* at 126, 474 N.E.2d at 226-27, 485 N.Y.S.2d at 18-19. In his dissent, Judge Meyer argued that the claim did not involve educational malpractice, but was a breach of custodial duty and sustainable under New York law. See *id.* at 129-30, 474 N.E.2d at 228, 485 N.Y.S.2d at 20 (Meyer, J., dissenting).

¹⁹³ See 118 Cal. App. 3d 300, 318-19, 173 Cal. Rptr. 371, 380 (1981).

¹⁹⁴ *Id.* at 308-09, 316, 173 Cal. Rptr. at 374, 379.

The county alleged that the university had failed to educate, train and supervise the hospital residents in breach of the agreement.¹⁹⁵ Thus, the county alleged that the school had breached the terms of its contract and should be held liable.

In holding for the county, the *Riverside* court reasoned that, unlike earlier educational cases, the parties' affiliation agreement had created a special relationship between the county and the school.¹⁹⁶ In addition, the court reasoned that the agreement provided the court with objective standards for determining what conduct constituted due care for the medical school.¹⁹⁷ With the use of expert testimony, the court determined within the constructs of the contractual arrangement that the medical school had not trained the residents according to the standards of practice for reasonable medical teaching institutions.¹⁹⁸ Thus, the *Riverside* court concluded that there was sufficient evidence to support the trial court's finding that the university was negligent in discharging its contractual obligations to educate and train the county hospital's residents.¹⁹⁹

Subsequent courts have further developed the idea that contract terms can provide a court with a standard of care for educators in educational negligence claims.²⁰⁰ For example, in 1984, the Civil Court of the City of New York, in *Village Community School v. Adler*, considered a counterclaim against a private school for breach of contract and found the claim permissible.²⁰¹ In *Adler*, a parent alleged that a school's agents had represented that the school possessed a specialized facility that could identify and treat children with learning disabilities, and that the school had failed to properly treat her child. The *Adler* court reasoned that because the defendant had made certain promises to the parent, its activities were no longer discretionary, but required full contract performance.²⁰² The

¹⁹⁵ See *id.* at 317-18, 173 Cal. Rptr. at 380.

¹⁹⁶ *Id.* at 319 n.7, 173 Cal. Rptr. at 379-80 n.7.

¹⁹⁷ See *id.*; see also *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1331 (N.D. Ill. 1990) (stating in dicta that where a school breaches an expressed contractual provision the court might find a school liable); *Wickstrom v. North Idaho College*, 111 Idaho 450, 452-53 & n.1, 725 P.2d 155, 157-58 & n.1 (1986) (stating in dicta that if the terms of an implied contract between a student and a private school, i.e., a school catalogue, were breached, a valid claim could exist).

¹⁹⁸ See *Riverside*, 118 Cal. App. 3d at 317-18, 173 Cal. Rptr. at 380.

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., *Village Community School v. Adler*, 124 Misc. 2d 817, 819, 478 N.Y.S.2d 546, 548 (Civ. Ct. 1984).

²⁰¹ *Id.* at 818, 478 N.Y.S.2d at 547.

²⁰² *Id.* at 819, 478 N.Y.S.2d at 548.

court concluded that because a contractual relationship had existed between the parties, the court did not have to review the educator's discretionary activities, and thus, the claim was permissible. The *Adler* court established that if a school represents itself as possessing specialized knowledge and abilities, it can be held liable for failure to perform such duties.

In addition, one court has concluded that if a plaintiff can phrase his contract claim against an educational institution so as not to mention the words educational negligence or malpractice, it may be permissible. In 1990, the Ohio Court of Appeals, in *Malone v. Academy of Court Reporting*, considered students' claims against a paralegal institute that alleged breach of contract and consumer fraud, and held that the plaintiffs had a cause of action.²⁰³ The plaintiffs in *Malone* had enrolled in defendant's school, alleging that the defendant had represented that it was certified to teach paralegal studies, and that completion of its course would qualify them to be paralegals.²⁰⁴ In addition, the plaintiffs alleged that the school had claimed to have admissions standards, job placement services, and hours that were transferable to the state university. All of the students had attended the school for a year until they discovered that the state officials had not accredited the school.²⁰⁵ When the plaintiffs discovered it was not accredited, had been given misleading and inaccurate answers, and had been unable to obtain legal positions, they sued the defendant for breach of contract and fraud.²⁰⁶

The *Malone* court overturned the trial court's finding that the claims were for educational negligence, and thus, held that the plaintiffs' claims were permissible.²⁰⁷ The court reasoned that because the plaintiffs had not mentioned educational negligence or malpractice in their claim, it was a breach of contract claim.²⁰⁸ The court further reasoned that the subject matter did not require the court to defer to state agency expertise by dismissing the claim.²⁰⁹ Concluding that the existence of administrative remedies did not preclude common-law remedies, the court remanded the case for

²⁰³ No. 90AP-264, 90AP-430, slip op. at 10 (Ohio App. Dec. 31, 1990) (LEXIS, States library, Omni file).

²⁰⁴ *Id.* at 2-3.

²⁰⁵ *Id.* at 3.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 10.

²⁰⁹ *Id.* at 7.

further proceeding.²¹⁰ Therefore, *Malone* established that where a plaintiff's breach of contract claim against an educator does not mention the words negligence or malpractice, the court may permit it.²¹¹

Thus, courts have evolved a theory that contract terms can be a basis for a standard of care for educators. A few courts have concluded that contract claims based on educational negligence are subject to the same public policy concerns as tort claims and are not recognizable.²¹² Other courts, however, have concluded that contracts with private schools can provide a standard of care for educators.²¹³ These courts have held that if a school is negligent in meeting its contractual obligations to educate, then an action for breach of contract may be viable.

In sum, creation of an educational standard of care is a greatly debated element of the preventative public policy considerations that the *Donohue* court identified. In considering educational malpractice claims, courts have looked to common-law, statutory language, or contractual terms for a standard and duty of care.²¹⁴ Those courts that have concluded that education is unlike other professions, and that jurors cannot understand educational methodology, have held that no professional standard of care for educators exists.²¹⁵ Other majority and minority opinions have reasoned that educators are similar to other professionals, and thus, they should be subjected to a standard of care as determined from other educators' conduct.²¹⁶

Where courts and justices have determined that legislation exists to protect children from educational injuries, they have concluded that an educator's conduct can be measured against its provisions.²¹⁷ Where, however, courts have concluded that the enactment did not contemplate civil action and was purely administrative, they have refused to recognize a cause of action based on

²¹⁰ *Id.* at 8, 12.

²¹¹ *Id.* at 9-10.

²¹² See *supra* notes 174-92 and accompanying text.

²¹³ See *supra* notes 193-211 and accompanying text.

²¹⁴ See cases *supra* notes 107-09 and accompanying text.

²¹⁵ See *supra* notes 112-29 and accompanying text for a discussion of the courts' negative treatment of a common-law standard of care for educators.

²¹⁶ See *supra* notes 133-41 and accompanying text for a discussion of the courts' positive treatment of a common-law standard of care for educators.

²¹⁷ See *supra* notes 145-58 and accompanying text for a discussion of the courts' positive treatment of a statutory standard of care for educators.

statutory violation.²¹⁸ Finally, courts have concluded that where the terms of contracts with private institutions provide specific objectives for educators' conduct, plaintiffs' claims avoid the problems that educational negligence tort actions raise, and therefore, are recognizable.²¹⁹

2. Proving Proximate Cause

Another preventative consideration of public policy that the *Donohue* court enumerated, and that subsequent courts have discussed, is the difficulty in proving causation.²²⁰ In *Donohue*, the New York Supreme Court reasoned that the defendant's negligent teaching had not clearly caused the plaintiff's illiteracy because his classmates had learned in the same environment.²²¹ The *Donohue* court further reasoned that because it was impossible to demonstrate that the defendant's breach of duty to teach properly was the proximate cause of the student's failure to learn, the plaintiff had no cause of action.²²² Thus, the *Donohue* court established the proposition that education defies accepted legal methods of proving causation, and therefore, is not subject to malpractice actions.

At least one court has concluded that because one cannot determine a child's academic success absent a school's wrongful conduct, it is impossible to prove or disprove legal cause. In 1981, the Alaska Supreme Court, in *D.S.W. v. Fairbanks North Star Borough School District*, refused to recognize a negligent teaching cause of action because of the difficulty of proving causation.²²³ The court, citing *Peter W.* and *Donohue*, adopted the reasoning that because a host of subjective factors affects a student during his or her education, a court cannot determine causation in educational claims.²²⁴

²¹⁸ See *supra* notes 161-70 and accompanying text for a discussion of the courts' negative treatment of a statutory standard of care for educators.

²¹⁹ See *supra* notes 171-211 and accompanying text for a discussion of the courts' treatment of a contractual standard of care for educators.

²²⁰ See, e.g., *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 33, 407 N.Y.S.2d 874, 877 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824-25, 131 Cal. Rptr. 854, 860-61 (Ct. App. 1976).

²²¹ See *Donohue*, 64 A.D.2d at 39, 407 N.Y.S.2d at 881.

²²² See *id.*; see also *Poe v. Hamilton*, 56 Ohio App. 3d 137, 138-39, 565 N.E.2d 887, 889 (1990).

²²³ 628 P.2d 554, 554 (Alaska 1981).

²²⁴ *Id.* at 555-56.

Thus, the *D.S.W.* court established that causation in educational negligence cases is beyond the Alaskan courts' ability.²²⁵

Some commentators are in agreement with the *Donohue* and *D.S.W.* courts' reasoning that proximate cause in the context of education is impossible to prove.²²⁶ For example, one commentator argues that because the causes of non-learning are numerous and beyond the average layjuror's understanding, complex expert testimony would weigh down educational malpractice trials.²²⁷ He further asserts that in the absence of scientific evidence, and professional consensus on pedagogical methodology, jury verdicts on causation would be arbitrary.²²⁸ Concluding that many variables interact during the lengthy period of a child's education, and that no connection exists between teacher quality and cognitive skills, this commentator asserts that educational causation is incapable of proof.²²⁹

In contrast to these conclusions of causal impossibility, the New York Court of Appeals, in *Donohue*, stated that although causation in the educational context may be difficult to prove, it assumes too much to conclude that it can never be established.²³⁰ Furthermore, in *B.M. v. State*, the Montana Supreme Court concluded that the question of whether the state had breached a duty of care to the plaintiff, and whether that breach was the cause of the plaintiff's injury was a material question of fact for trial.²³¹ Thus, some courts have concluded that educational causation is not impossible to prove and should be submitted to the trier of fact.

In support of the conclusion that proximate cause is a question for trial, one commentator notes that medical malpractice actions raise troublesome causation questions, and yet, that controversy does not immunize physicians from liability arising from their mis-

²²⁵ See *id.* at 556; see also *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1329 (N.D. Ill. 1990) (reasoning that education is a collaborative process requiring a large amount of cooperation between student and teacher, and thus, ultimately, the student always has responsibility for his or her academic success).

²²⁶ See *Funston*, *supra* note 2, at 784-90.

²²⁷ *Id.* at 787-88.

²²⁸ See *id.* at 788-89.

²²⁹ *Id.* at 789-90.

²³⁰ See *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353-54, 418 N.Y.S.2d 375, 377 (1979); see also *Hoffman v. Board of Educ. of New York*, 49 N.Y.S.2d 121, 127, 400 N.E.2d 317, 321, 424 N.Y.S.2d 376, 380 (1979) (Meyers, J., dissenting) (arguing that because reevaluation was an important part of the defendant's procedure, the court should have viewed failure to retest as the proximate cause of the plaintiff's injuries).

²³¹ 200 Mont. 58, 60, 649 P.2d 425, 426 (1982).

conduct.²³² Thus, he argues that educators should not be shielded from liability due to the difficulties of proving proximate cause in education.²³³ Furthermore, he asserts that educators should not be treated differently than other professionals at the expense of injured children.²³⁴

Another commentator suggests that a plaintiff claiming educational malpractice should have the opportunity to offer evidence proving causation to the jury.²³⁵ He asserts that plaintiffs could submit evidence of their educability, their test scores demonstrating below basic skills, documentation of other comparable students' achievement, and research and testimony of alternative educational methodologies that might lead to an inference of causation. He concludes that such evidence could establish a prima facie case that a school's failure to follow community standards was a proximate cause of a child's failure to learn. Ultimately, he argues that whether a school system, or outside forces, caused a child's failure to achieve a basic level of literacy is a question of proof to be resolved at trial.²³⁶

Thus, the debate over the public policy consideration of the difficulty of showing proximate cause has centered on the perceived ease or difficulty of isolating the factors affecting a child's academic success.²³⁷ Some courts have reasoned that educational malpractice defies a causation analysis because it involves the interaction of many factors over a number of years. Other courts have suggested that education is no more complex than other professions, and therefore, that causation is a question for the trier of fact.²³⁸

3. The Existence of Educational Injury

The final elements of the preventative considerations of public policy that the *Donohue* court identified are the foreseeability and assessment of alleged educational injury.²³⁹ The debate in this area

²³² See Jerry, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 KAN. L. REV. 195, 203 (1981).

²³³ *Id.* at 206-07.

²³⁴ *Id.*

²³⁵ Ratner, *supra* note 142, at 857.

²³⁶ See *id.* at 557-58.

²³⁷ See *supra* notes 220-25 and accompanying text for a discussion of the impossibility of proving proximate cause in educational malpractice claims.

²³⁸ See *supra* notes 230-31 and accompanying text for a discussion of the possibility of proving proximate cause in educational malpractice claims.

²³⁹ *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 32, 407 N.Y.S.2d 874, 877 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

has focused on whether children have actually suffered injuries in cases where schools have acted negligently and, if so, whether such injuries are measurable. In 1978, the New York Supreme Court, Appellate Division, in *Donohue*, stated that because every child is born lacking knowledge, education, and experience, the failure of educational achievement is not a tortious injury.²⁴⁰ Therefore, the *Donohue* court concluded that a plaintiff had no cause of action for educational malpractice or breach of a statutory duty to educate against his school.

In addition, some courts have further reasoned that because educational injuries are immeasurable, the courts should not allow a civil remedy for educational negligence.²⁴¹ For example, in 1982, the Maryland Court of Appeals, in *Hunter v. Board of Education of Montgomery County*, stated that damages resulting from educational negligence were inherently immeasurable.²⁴² Citing *Peter W.*, the *Hunter* court concluded that it could not determine the nature of educational injuries, and thus, dismissed the plaintiff's action.²⁴³

At least one commentator has supported the *Donohue* and *Hunter* courts' position that educational injuries are nonexistent or immeasurable.²⁴⁴ He asserts that the educational malpractice plaintiff only has lost an expectancy interest, or has failed to receive a benefit, and that the law of torts generally compensates neither of these interests. In addition, he argues that it is almost impossible to calculate the monetary loss or damages that result from non-learning. He further asserts that if plaintiffs characterize educational injuries as lost self-esteem, then the value of literacy to an individual is speculative, and its loss does not warrant legal damages.²⁴⁵ If, on the other hand, loss is in terms of lost expected income, he asserts, it is a mere expectation, and also does not warrant damages. Thus, this commentator concludes that alleged educational injuries, if recognizable at all, are immeasurable and should not be compensated.²⁴⁶

²⁴⁰ *Donohue*, 64 A.D.2d at 37, 407 N.Y.S.2d at 880; see also *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824-25, 131 Cal. Rptr. 854, 861 (Ct. App. 1976).

²⁴¹ See, e.g., *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 585-86 (Md. 1982); see also *Smith v. Alameda County Social Servs. Agency*, 90 Cal. App. 3d 929, 942-43, 153 Cal. Rptr. 712, 719 (Ct. App. 1979).

²⁴² 439 A.2d at 585-86.

²⁴³ *Id.*

²⁴⁴ See Funston, *supra* note 2, at 783.

²⁴⁵ *Id.* at 784.

²⁴⁶ See *id.*

In contrast, some courts have suggested that students can suffer measurable injuries as a result of educational malpractice.²⁴⁷ For example, the New York Court of Appeals, in *Donohue*, stated in dicta that a graduating high school student who could not comprehend simple English had undeniably suffered injuries.²⁴⁸ Although concluding that educational malpractice claims could not be recognized for public policy reasons, the *Donohue* court suggested that one could prove measurable injuries from educational malpractice.²⁴⁹

Furthermore, in his *Hunter* dissent, Judge Davidson argued that Maryland courts had historically recognized mental and emotional distress injuries and lost earning potential despite the difficulty and speculativeness of such computations.²⁵⁰ Judge Davidson reasoned that the plaintiff in *Hunter* claiming educational negligence should be treated no differently than other victims of non-intentional torts, and should receive damages.²⁵¹ He, therefore, concluded that the difficulty in measuring injuries for educational malpractice claims should not prevent recovery, and thus, a viable cause of action should exist for educational malpractice.²⁵²

Some commentators have agreed that educational injuries are measurable within the existing legal framework.²⁵³ Difficulty in assessing damages, one commentator argues, is not a forceful reason for refusing to recognize a tort of educational malpractice where injury has resulted.²⁵⁴ He suggests that calculation of lost future earnings of a student who cannot obtain meaningful employment is not impossible.²⁵⁵ Also, he notes that courts have considered

²⁴⁷ See *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 377 (1979); see also *Hunter*, 439 A.2d at 589 (Davidson, J., concurring in part and dissenting in part).

²⁴⁸ *Donohue*, 47 N.Y.2d at 443, 391 N.E.2d at 1354, 418 N.Y.S.2d at 377.

²⁴⁹ See *id.*; see also *Doe v. Board of Educ. of Montgomery County*, 453 A.2d 814, 814 (Md. 1982) (Eldridge, J., dissenting) (student suffered measurable severe and permanent injury as the result of the defendant school's negligent conduct).

²⁵⁰ See *Hunter*, 439 A.2d at 589 (Davidson, J., concurring in part and dissenting in part); see also *Pierce v. Board of Educ. of Chicago*, 44 Ill. App. 3d 324, 326, 358 N.E.2d 67, 69 (1976) (court refused to deny damages for educational emotional injury that was not accompanied by physical injury), *rev'd*, 69 Ill. 2d 89, 370 N.E.2d 535 (1977).

²⁵¹ See *Hunter*, 439 A.2d at 589 (Davidson, J., concurring in part and dissenting in part).

²⁵² *Id.*

²⁵³ See Jerry, *supra* note 232, at 203; Elson, *supra* note 49, at 759-61. When courts consider education a marital asset to be divided between spouses pursuant to a divorce settlement, courts place value on skills or education insofar as they affect future earning capacity. *Id.*

²⁵⁴ See Jerry, *supra* note 232, at 203.

²⁵⁵ See *id.* at 206-07.

education a marital asset to be divided between spouses in divorce settlements and they have placed a value on education as an element of earning capacity.²⁵⁶ Furthermore, he argues that courts have awarded damages to children whom medical personnel have injured, and concludes that courts can also do so for educational malpractice claimants.²⁵⁷

Overall, the existence and measurability of injury resulting from negligent instruction is a subject of debate among courts and commentators. A few courts have concluded that a lack of a proper education leaves a child no worse off than before he or she attended school, and consequently, the child has not suffered a legally recognizable injury.²⁵⁸ Other courts have reasoned that lack of academic achievement, like medical injury, is a measurable injury that the law should compensate.²⁵⁹

In sum, jurisdictions confronting educational malpractice claims continue to debate the first category of preventative public policy considerations that the *Donohue* court identified. Courts' concern over the judiciary's ability to determine a standard of care for educators, to prove proximate cause, and to measure the alleged injury from educational negligence has affected their decision to recognize or deny the new cause of action. Although a majority of courts have concluded that proving the elements of an educational tort are impossible, others have reasoned that it is no more difficult than proving the elements in other professional malpractice actions.

B. Moral Considerations: Judicial Involvement, the Student-Teacher Relationship, and Education's Social Utility

The second category of public policy concerns that the *Donohue* court identified was moral considerations.²⁶⁰ These considerations concerned the degree to which courts should be involved in the regulation of education. This category also included society's view

²⁵⁶ *Id.* at 203 n.72. See generally, Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 388-89 (1980) (discussing the increased legal protection for an individual's proprietary interest in his own skills); Note, *Spousal Interests in Professional Degrees: Solving the Compensation Dilemma*, 31 B.C.L. REV. 749, 756-59 (1990) (degree or license is marital property subject to valuation and division).

²⁵⁷ See Jerry, *supra* note 232, at 206-07; see also Collingsworth, *supra* note 50, at 502-03.

²⁵⁸ See *supra* notes 240-43 and accompanying text.

²⁵⁹ See *supra* notes 247-52 and accompanying text.

²⁶⁰ *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 33, 407 N.Y.S.2d 874, 877 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

toward the student-teacher relationship, and education's social utility. The first moral element of public policy, that of the proper degree of judicial interference, has received the most attention in court opinions. In *Donohue*, the New York Supreme Court concluded that the judicial system was an inappropriate forum in which to test the efficacy of educational programs and pedagogical methods.²⁶¹ On appeal, the New York Court of Appeals affirmed the trial court's holding, concluding that recognition of the cause of action would have been blatant interference with the state school administrative agencies' responsibilities.²⁶²

Subsequent courts have concurred with *Donohue* that it is not within the judicial function to evaluate the conflicting educational theories that necessarily arise in educational malpractice claims.²⁶³ For example, in 1979, the New York Court of Appeals in *Hoffman v. Board of Education of New York*, considered an educational malpractice claim alleging that a school had negligently tested a normally intelligent student suffering from a speech defect, and as a result had misplaced him in a class for the mentally retarded.²⁶⁴ The court reasoned that it should not evaluate educational policies, and thereby substitute its judgment, or a jury's judgment, for that of professional educators.²⁶⁵ As a result, the *Hoffman* court concluded that public policy dictated that the plaintiff had no cause of action for educational malpractice.²⁶⁶

The plaintiff in *Hoffman* alleged that the defendant had enrolled him in a class for the mentally retarded despite contrary recommendations and had failed to retest him for thirteen years.²⁶⁷ At the plaintiff's mother's request, the defendant finally had the plaintiff retested, and discovered that he was not retarded. As a result of the retesting, the plaintiff alleged that the defendant had forced him to leave his occupational training program after thirteen years. The plaintiff further claimed that he had suffered severe injury to his emotional and intellectual well-being, as well as a loss

²⁶¹ *Id.* at 35-36, 407 N.Y.S.2d at 878-79.

²⁶² *Donohue*, 47 N.Y.2d at 444-45, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378.

²⁶³ *See, e.g.*, *Moore v. Vanderloo*, 389 N.W.2d 108, 115 (Iowa 1986); *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 585 (Md. 1982); *Palandino v. Adelphi Univ.*, 89 A.D.2d 85, 91-92, 454 N.Y.S.2d 868, 872-73 (App. Div. 1982).

²⁶⁴ 49 N.Y.2d 121, 123-25, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 378 (1979), *reversing* 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978).

²⁶⁵ *See id.* at 125-27, 400 N.E.2d at 320, 424 N.Y.S.2d at 379.

²⁶⁶ *Id.* at 125, 400 N.E.2d at 317, 424 N.Y.S.2d at 378.

²⁶⁷ *Id.* at 124, 400 N.E.2d at 318-19, 424 N.Y.S.2d at 377-78.

of employment opportunity, as a result of the defendant's conduct.²⁶⁸

The trial court stated that negligence was negligence, and reasoned that the trier of fact had to determine whether the defendant had failed to follow its own recommendations for retesting the student. It concluded that if the defendant was found to have violated such standards it could be held liable.²⁶⁹ The court refused to give greater weight to the private value judgments of a public policy analysis than to an injured person's legitimate legal rights.²⁷⁰ The court distinguished *Hoffman* from *Donohue* and *Peter W.*, concluding that the school's failure to follow its own retesting procedure in *Hoffman* was misfeasance, and not the nonfeasance that the schools in *Donohue* and *Peter W.* had committed. Thus, the trial court concluded in *Hoffman* that the school could be held liable for affirmative negligence.²⁷¹

On appeal, however, the *Hoffman* court stated that the public policy considerations that had prompted its *Donohue* decision applied with equal force to educational malpractice actions, whether based upon allegations of educational misfeasance or nonfeasance.²⁷² The court stated its opposition to judicial review of what it perceived as professional educators' complex and delicate discretionary decision-making, and refused to recognize the plaintiff's cause of action.²⁷³ Thus, *Hoffman* established that educational malpractice claims, alleging misfeasance or nonfeasance, necessitate unwarranted judicial interference and oversight in educational policy-making, and therefore, these claims are not recognizable in New York.²⁷⁴

As justification for their views regarding judicial non-interference in education, courts have stated that more appropriate reme-

²⁶⁸ *Id.* at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.

²⁶⁹ *See Hoffman v. Board of Educ. of New York*, 64 A.D.2d 369, 385-86, 410 N.Y.S.2d 99, 110 (App. Div. 1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

²⁷⁰ *Id.* at 386, 410 N.Y.S.2d at 110.

²⁷¹ *See id.* at 386, 410 N.Y.S.2d at 110.

²⁷² *Hoffman*, 49 N.Y.2d at 126, 400 N.E.2d at 320, 424 N.Y.S.2d at 379.

²⁷³ *See id.* at 125-27, 400 N.E.2d at 320-21, 424 N.Y.S.2d at 378-79; *see also* *Torres v. Little Flower Children's Servs.*, 64 N.Y.2d 119, 126, 474 N.E.2d 223, 226, 485 N.Y.S.2d 15, 18 (1984) (court concluded that it could not be responsible for evaluating educational policies when elusive factors such as a student's motivation, attitude, temperament, past experience and home environment were involved), *cert. denied*, 474 U.S. 864 (1985).

²⁷⁴ *See Hoffman*, 49 N.Y.2d at 126-27, 400 N.E.2d at 320-21, 424 N.Y.S.2d at 379; *see also DeRosa v. City of New York*, 132 A.D.2d 592, 594, 517 N.Y.S.2d 754, 756 (App. Div. 1987).

dies than civil actions are available for plaintiffs who have suffered alleged educational injuries.²⁷⁵ For example, in *Donohue*, the New York Supreme Court, Appellate Division, stated that the plaintiff's failing report card grades should have prompted his parents to begin administrative proceedings.²⁷⁶ In addition, on appeal, the New York Court of Appeals in *Donohue* concluded that the plaintiff should have sought review of his academic progress from the commissioner of education as allowed by state law and should not have resorted to the courts.²⁷⁷

Similarly, in *Hunter v. Board of Education of Montgomery County*, the Maryland Court of Special Appeals held that there was no civil cause of action for educational malpractice, reasoning that other more desirable methods to settle such disputes were available.²⁷⁸ Citing state legislative history, the *Hunter* court concluded that student classification and placement were intended to be handled informally through the administrative process, not through civil action.²⁷⁹ The *Hunter* court also reasoned that prompt administrative and judicial review could correct erroneous educational practices and obviate the need for monetary damages.²⁸⁰ Monetary damages, the *Hunter* court concluded, were a poor substitute for a proper education.²⁸¹ Thus, proponents of judicial non-interference have used the existence of alternative administrative remedies as justification for refusing to recognize a civil cause of action for educational malpractice.

Opponents to judicial non-intervention have argued, however, that judicial intervention in cases of educational negligence is necessary because alternative remedies are not a substitute for the damages that a plaintiff might receive in civil action.²⁸² For example,

²⁷⁵ See, e.g., *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 378 (1979), *aff'g* 64 A.D.2d 29, 407 N.Y.S.2d 874 (App. Div. 1978); see also *Lindsay v. Thomas*, 465 A.2d 122, 124 (Pa. Commw. Ct. 1983) (concluding that a claim against a school district for violation of public school code's special education provisions was not permissible because alternative remedies were available to plaintiff).

²⁷⁶ See *Donohue*, 64 A.D.2d at 38, 407 N.Y.S.2d at 881.

²⁷⁷ See *Donohue*, 47 N.Y.2d at 445, 391 N.E.2d at 1355, 418 N.Y.S.2d at 378.

²⁷⁸ 439 A.2d 582, 586 (Md. 1982).

²⁷⁹ *Id.*; see also *Lindsay*, 465 A.2d at 124.

²⁸⁰ *Hunter*, 439 A.2d at 586.

²⁸¹ *Id.*; see also *D.S.W. v. Fairbanks N. Star Borough School Dist.*, 628 P.2d 554, 557 (Alaska 1981) (concluding that the administrative process provided for an independent examination and evaluation, and a hearing that was sufficient remedy to correct a school's wrongful conduct, and thus, that monetary damages were inappropriate).

²⁸² See *Hunter*, 439 A.2d at 590 (Davidson, J., concurring in part and dissenting in part).

in Judge Davidson's *Hunter* dissent, he argued that there were no adequate administrative procedures in the educational system to compensate educational injuries. He further argued that administrative procedures did not address the problem of incompetent teaching, or provide adequate relief to a student already injured, and consequently, the court should have recognized an educational malpractice cause of action.²⁸³

One commentator agrees that administrative remedies do not compensate educationally-injured plaintiffs.²⁸⁴ She suggests that parents and their children are unlikely to take advantage of existing administrative procedures.²⁸⁵ Plaintiffs in educational claims, she asserts, lack a great degree of sophistication and will defer to educators without challenging the educators' decisions.²⁸⁶ In addition, she argues that some parents and students may not have access to the independent professional help and financial resources necessary to challenge educational policies through the administrative process.²⁸⁷ Thus, she asserts, administrative remedies should not preclude civil actions for educational malpractice.²⁸⁸

In sum, courts have concluded that judicial intervention is an important element of the public policy debate surrounding the acceptance of a cause of action for educational malpractice. A majority of courts have reasoned that judicial oversight of education would invite an unwarranted substitution of judicial judgment for legislative decision-making.²⁸⁹ These courts point to alternative remedies to civil actions for injured students as a justification for their decision.²⁹⁰ In contrast, however, opponents of judicial non-intervention have argued that such administrative alternatives do not satisfy the injured parties' immediate needs, and therefore, are not a substitute for civil action.²⁹¹

The remaining two moral considerations of public policy that the *Donohue* court identified are the relationship between students

²⁸³ *Id.*; see also *Doe v. Board of Educ. of Montgomery County*, 453 A.2d 814, 823 (Md. 1982) (Eldridge, J., dissenting) (arguing that money was not an inappropriate remedy in a misplacement claim because the plaintiff needed psychological treatment and special education, neither of which the school provided and both of which cost money).

²⁸⁴ Comment, *Hoffman v. Board of Education*, 10 HOFSTRA L. REV. 279, 300-04 (1981).

²⁸⁵ *Id.* at 301.

²⁸⁶ See *id.* at 301-02.

²⁸⁷ See *id.* at 302-03.

²⁸⁸ See *id.* at 303-04.

²⁸⁹ See *supra* notes 261-74 and accompanying text.

²⁹⁰ See *supra* notes 275-81 and accompanying text.

²⁹¹ See *supra* notes 282-88 and accompanying text.

and educators, and education's social utility.²⁹² A majority of the jurisdictions that have considered educational claims have not discussed these elements in detail. A few courts have recognized that the relationship between state educators and their pupils is often unequal and requires special judicial attention.²⁹³ In *Hoffman*, the New York Supreme Court, Appellate Division, in a majority opinion later reversed on appeal, reasoned that insulating educational entities from the legal responsibilities of other government agencies subrogated the tortiously injured student's legitimate interests and legal rights to those of the institution.²⁹⁴ Therefore, the lower *Hoffman* court concluded that it was not unreasonable to hold a school board liable when a student suffered injury.²⁹⁵

Similarly, at least one court has acknowledged that the activities of powerful public institutions, such as state education agencies, increasingly affect our society. In *Smith v. Alameda County Social Services Agency*, the California Court of Appeal, in considering an educational negligence claim against a government agency and school district, suggested in dicta that state institutional accountability was of considerable significance in maintaining a free society.²⁹⁶ The court further suggested that agency regulation was particularly important when the agency exercised control over children who were unable to protect themselves. Thus, although the *Smith* court refused to recognize the cause of action, it recognized that judicial scrutiny and agency accountability was a growing trend.²⁹⁷

Only a few courts and justices have discussed education's social utility in the context of educational malpractice claims. In *Hunter v. Board of Education of Montgomery County*, the Maryland Court of Special Appeals noted in dicta that a serious social problem existed when illiterate students were promoted through school.²⁹⁸ Although

²⁹² *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 33, 407 N.Y.S.2d 874, 877 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

²⁹³ *See, e.g., Palandino v. Adelphi Univ.*, 110 Misc. 2d 314, 315, 442 N.Y.S.2d 38, 38-39 (Sup. Ct. 1981), *rev'd*, 89 A.D.2d 85, 454 N.Y.S.2d 868 (1982); *see also Pierce v. Board of Educ. of Chicago*, 44 Ill. App. 3d 324, 326, 358 N.E.2d 67, 68 (App. Ct. 1976) (stating that the plaintiff, being a minor, was entitled to a high degree of care from the board of education, and from the trial judge), *rev'd*, 69 Ill. 2d 73, 370 N.E.2d 537 (1977).

²⁹⁴ *See Hoffman v. Board of Educ. of New York*, 64 A.D.2d 369, 385-86, 410 N.Y.S.2d 99, 110 (App. Div. 1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

²⁹⁵ *Id.* at 387, 410 N.Y.S.2d at 110.

²⁹⁶ 90 Cal. App. 3d 929, 938, 153 Cal. Rptr. 712, 717 (Ct. App. 1979).

²⁹⁷ *Id.* at 938-39, 153 Cal. Rptr. at 717.

²⁹⁸ 47 Md. App. 709, 716, 425 A.2d 681, 684 (Ct. Spec. App. 1981), *modified*, 439 A.2d 582 (Md. 1982).

the *Hunter* court quoted Thomas Jefferson's statement that a nation cannot be both free and ignorant, it concluded that the danger was not great enough to warrant recognition of a cause of action for educational malpractice.²⁹⁹

Thus, only a few courts have discussed the public policy elements of the relationship between educator and student, and the social utility of education. Those courts that have addressed these elements have reasoned that although the growing threat of illiteracy is serious, it does not warrant recognition of an action for educational negligence.³⁰⁰

In sum, the moral considerations that the *Donohue* court identified, and that subsequent courts have discussed, include judicial intervention, the student-teacher relationship, and education's social utility.³⁰¹ Although a majority of jurisdictions considering educational malpractice claims have weighted the value or harm of judicial oversight, few have considered the remaining two elements.³⁰² Those courts that have discussed education's social utility and the student-teacher relationship have reasoned that even though illiteracy is a grave threat, it does not warrant recognition of an action in tort.

C. Economic/Administrative Considerations

The final two public policy categories that the *Donohue* court enumerated are comprised of economic and administrative considerations.³⁰³ Economic considerations that courts have discussed focus on schools' ability to respond to damages in malpractice claims. Administrative considerations discussed by the courts include their ability to cope with a possible flood of litigation, and the probability of feigned claims.

Courts have stated that recognition of a cause of action for educational malpractice would expose both courts and defendants

²⁹⁹ *Id.* at 716, 425 A.2d at 684-85. *But see Hunter*, 439 A.2d 582, 590 (Davidson, J., concurring in part and dissenting in part) (stating that the failure of schools has reached massive proportions, society has suffered social and moral problems, and therefore, courts should recognize a cause of action for educational malpractice).

³⁰⁰ *See, e.g., Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861 (Ct. App. 1976) (refusing to agree that schools bear responsibility for many of society's social and moral problems); *see also* cases cited *supra* notes 293, 294, 298 and accompanying text.

³⁰¹ *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 33, 407 N.Y.S.2d 874, 877 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

³⁰² *See supra* notes 261-300 and accompanying text.

³⁰³ *See, e.g., Donohue*, 64 A.D.2d at 32, 407 N.Y.S.2d at 877.

to disaffected students' innumerable real or feigned tort claims.³⁰⁴ Some courts have concluded that recognition ultimately would burden the public tremendously in terms of time and money.³⁰⁵ Thus, these courts have concluded that no cause of action for educational malpractice existed.³⁰⁶

Moreover, a number of courts have dismissed educational malpractice claims because of the administrative fear of excessive litigation resulting from recognition of such claims. For example, the *Hunter* court expressed concern that if it recognized educational malpractice claims, such claims would arise every time a child failed a grade, subject, or test, resulting in teachers spending more time in courtrooms than in classrooms.³⁰⁷ Similarly, in 1990, the United States District Court for the Northern District of Illinois, in *Ross v. Creighton University*, denied a student-athlete's claim alleging negligent infliction of emotional distress against a university for negligently recruiting and enrolling him.³⁰⁸ The plaintiff alleged that the school had enrolled him without providing substantial tutoring, and thus, he was incapable of performing the required academic work. The *Ross* court reasoned that because education is rendered on such an immense scale, and requires a high degree of student cooperation, it is unlike any other profession.³⁰⁹ Consequently, the *Ross* court reasoned that recognition of educational malpractice would mean a real danger of unrestrained and numerous lawsuits, and thus, the court held that Illinois could not recognize the claim.³¹⁰

In contrast, some have argued that even if recognition of educational malpractice results in a flood of litigation,³¹¹ the court

³⁰⁴ See, e.g., *Peter W.*, 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

³⁰⁵ See, e.g., *Smith v. Alameda County Social Servs. Agency*, 90 Cal. App. 3d 929, 941, 153 Cal. Rptr. 712, 719 (Ct. App. 1979) (claim against a public agency and school); *Moore v. Vanderloo*, 386 N.W.2d 108, 114-15 (Iowa 1986) (doctor's educational malpractice within a medical malpractice claim); *Rich v. Kentucky County Day School*, 793 S.W.2d 832, 836 (Ky. Ct. App. 1990) (claim against a private school).

³⁰⁶ See, e.g., *Smith*, 90 Cal. App. 3d at 941, 153 Cal. Rptr. at 719; *Moore*, 386 N.W.2d at 114-15.

³⁰⁷ *Hunter v. Board of Educ. of Montgomery County*, 47 Md. App. 709, 715-16, 425 A.2d 681, 684-85 (Ct. Spec. App. 1981), *modified*, 439 A.2d 582 (Md. 1982).

³⁰⁸ 740 F. Supp. 1319, 1327 (N.D. Ill. 1990).

³⁰⁹ *Id.* at 1329.

³¹⁰ *Id.* at 1329-30.

³¹¹ See *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 41-42, 407 N.Y.S.2d 874, 883 (App. Div. 1978) (Suozi, J., dissenting), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

must still remedy wrongs that deserve it.³¹² For example, Judge Suozzi argued in his *Donohue* dissent that a fear of a flood of litigation was meritless, and a court should not dismiss a cause of action in educational malpractice on this basis.³¹³ To support his argument, he cited the abolition of sovereign immunity in New York as an example that refuted the fear of excessive litigation that a new zone of liability generated.³¹⁴ Consequently, he argued that courts, as in other malpractice cases, should recognize claims of negligence against educational institutions.³¹⁵

In sum, the economic and administrative public policy considerations that the *Donohue* court identified, and that subsequent courts have discussed in their analysis of educational malpractice, include the possibility of a flood of new litigation and its societal cost.³¹⁶ Some opinions have suggested that education is so unique as to present more difficult financial and practical problems than other malpractice claims, and, as a result, it should not be subject to malpractice claims.³¹⁷ Others have argued that a questionable fear of a flood of litigation is an insufficient reason to deny a remedy for a child's injury resulting from an educator's wrongful conduct.³¹⁸

III. PARALLEL FACT PATTERNS?: OTHER PROFESSIONAL MALPRACTICE CLAIMS

Although a majority of plaintiffs alleging negligence in educational testing, placement, or instruction have done so under the theory of educational malpractice, some plaintiffs have brought

³¹² See *Hunter*, 439 A.2d 582, 590 (Md. 1982) (Davidson, J., concurring in part and dissenting in part) (reasoning that no empirical evidence supports similar flood of litigation arguments in cases that recognized students' constitutional rights); see also *Doe v. Board of Educ. of Montgomery County*, 453 A.2d 814, 823 (Md. 1982) (Eldridge, J., dissenting) (citing W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 12 at 51 (4th ed. 1971)) (concluding that denying relief to deserving plaintiffs on the grounds that such relief will deluge the system was "a pitiful confession of incompetence on the part of the court...").

³¹³ *Donohue*, 64 A.D.2d at 41-42, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

³¹⁴ *Id.* at 42, 407 N.Y.S.2d at 883. See generally Collingsworth, *supra* note 50, at 503-04 (discussing the removal of blanket immunity from state agencies and the inconsistencies of a "flood of litigation" argument against educational malpractice).

³¹⁵ See *Donohue*, 64 A.D.2d at 42, 407 N.Y.S.2d at 883. See generally Elson, *supra* note 49, at 652-54 (discussing the weaknesses inherent in the "flood of litigation" argument).

³¹⁶ *Donohue*, 64 A.D.2d at 33, 407 N.Y.S.2d at 877.

³¹⁷ See *supra* notes 304-10 and accompanying text.

³¹⁸ See *supra* notes 311-15 and accompanying text.

similar claims under the theory of medical malpractice.³¹⁹ In addition, some courts, on their own initiative, have relabeled educational malpractice-like claims as medical malpractice and found them to be recognizable.³²⁰ Negligent evaluation or treatment claims against educators that the courts have accepted as medical malpractice, have, in fact, met with more success than their educational counterparts.³²¹

For example, in 1983, the New York Supreme Court, Appellate Division, in *Snow v. State*, considered a child's negligence claim against two state-run schools, and held that the plaintiff had an actionable claim for medical malpractice.³²² In *Snow*, the plaintiff alleged that on the basis of an I.Q. test, the defendant had negligently diagnosed and misplaced him in handicapped classes for six years until it was discovered that he was not retarded, but merely deaf.³²³ The plaintiff alleged that the defendant had failed to reevaluate him despite reports indicating that he had demonstrated questionable hearing.³²⁴ The plaintiff further claimed that he had suffered mental and physical injury as a result of the school's conduct.³²⁵

Reasoning that the children at the state schools had been under continuous treatment, and that their medical insurance had paid their bills, the *Snow* court concluded that the action against the schools was medical, rather than educational, malpractice.³²⁶ Through the use of expert testimony, the *Snow* court further determined that the school's failure to reevaluate the student was more than just an error of professional judgment.³²⁷ Thus, the court concluded that the schools had failed to exercise reasonable care, and their conduct had departed from accepted medical standards.³²⁸

In holding that the plaintiff had a valid claim, the New York Supreme Court, Appellate Division, distinguished the plaintiff in

³¹⁹ See, e.g., *Savino v. Board of Educ. of School Dist. No. 1*, 123 A.D.2d 314, 314-15, 506 N.Y.S.2d 210, 211-12 (App. Div. 1986).

³²⁰ See, e.g., *Snow v. State*, 98 A.D.2d 442, 447, 469 N.Y.S.2d 959, 962 (App. Div. 1983), *aff'd*, 64 N.Y.2d 753, 475 N.E.2d 454, 485 N.Y.S.2d 987 (1984).

³²¹ See generally Loscalzo, *supra* note 48, at 599-601 (discussion of *Snow v. State* as the initial breakdown of the public policy barrier to recognition of educational malpractice).

³²² *Snow*, 98 A.D.2d at 443-44, 447, 469 N.Y.S.2d at 960, 962.

³²³ *Id.* at 443-44, 469 N.Y.S.2d at 960.

³²⁴ *Id.* at 444, 469 N.Y.S.2d at 960.

³²⁵ *Id.* at 443-44, 469 N.Y.S.2d at 960.

³²⁶ *Id.* at 445, 469 N.Y.S.2d at 961.

³²⁷ *Id.* at 447, 469 N.Y.S.2d at 962.

³²⁸ *Id.* at 445-46, 469 N.Y.S.2d at 961.

Snow from the students in *Donohue* and *Hoffman*.³²⁹ The court noted that in *Hoffman*, the teacher's daily observation of the plaintiff's lack of progress justified the teacher's decision not to reevaluate him.³³⁰ Thus, the court maintained that the decision not to retest the student in *Hoffman* was an error of judgment in the educational process. In contrast, the New York Supreme Court concluded that the teachers' recorded observations in *Snow* should have put them on notice of the inaccuracy of the original I.Q. test and the need for reevaluation. The *Snow* court held that the schools' conduct was actionable medical, not educational, malpractice.³³¹ Thus, the New York Supreme Court established that negligent diagnosis, treatment, and education claims against educators can be sustained, if the court characterizes them as medical malpractice.

Similarly, in 1986, the New York Supreme Court, Appellate Division, in *Savino v. Board of Education*, considered a mother's claim that a school's agents had conducted psychological tests on her son, which revealed that he was suffering from severe psychological problems, and that the school had failed to notify her.³³² In holding for the plaintiff, the *Savino* court maintained that because the claim did not allege improper education or failure to assess a student's intellectual capacity correctly, the claim was not educational.³³³ The court in *Savino* concluded that the school's diagnostic actions were not educational in nature.³³⁴ As a result, the *Savino* court established that if a claim against a school for negligent evaluation does not allege educational malpractice, the action may be permissible.

Although the New York courts have concluded that some student claims against schools are actionable medical malpractice, they have recharacterized other students' medical claims as educational, and dismissed them.³³⁵ For example, in 1987, the New York Su-

³²⁹ See *id.* at 449-50, 469 N.Y.S.2d at 963-64.

³³⁰ *Id.* at 450, 469 N.Y.S.2d at 964.

³³¹ *Id.* at 445, 469 N.Y.S.2d at 961. In *Torres v. Little Flower Children's Services*, the New York Court of Appeals distinguished *Snow*, stating that in *Snow* the students were referred to as "patients," the plaintiff's records resembled hospital records rather than a school report, and payment for treatment was made under a parent's medical plan. 64 N.Y.2d 119, 126 n.2, 474 N.E.2d 223, 226 n.2, 485 N.Y.S.2d 15, 18 n.2 (1984), *cert. denied*, 474 U.S. 864 (1985). The court further reasoned that a child's age upon entry, the nature of the institution and the kind of care given marked the difference between educational and medical malpractice claims. *Id.*

³³² 123 A.D.2d 314, 314-15, 506 N.Y.S.2d 210, 211 (App. Div. 1986).

³³³ *Id.* at 315, 506 N.Y.S.2d at 211.

³³⁴ See *id.* Presumably, this case could have proceeded under a label of medical malpractice.

³³⁵ See, e.g., *Sitomer v. Half Hollow Hills Cent. School Dist.*, 133 A.D.2d 748, 749-50,

preme Court, Appellate Division, in *Sitomer v. Half Hollow Hills Central School District*, held that a junior high school student's claim against a school physician alleging medical negligence and negligent infliction of emotional distress was for educational malpractice, and therefore, not permitted under New York law.³³⁶ The plaintiff alleged that the school physician's determination that he was not physiologically mature enough to try out for the high school tennis team was negligent.³³⁷ He further alleged that the school physician had negligently failed to exercise reasonable judgment and follow proper medical procedures in evaluating his level of physiological maturity. Moreover, the plaintiff alleged that the school district's actions in support of this determination were arbitrary, capricious and unlawful. The court reasoned that the school physician had based his determination on the results of a state educational department screening test. Thus, citing *Hoffman* and *Torres*, the *Sitomer* court noted that to allow the cause of action would be to substitute inappropriately the court's judgment for the judgment of professional educators. Consequently, the *Sitomer* court concluded that the student's claim was educational malpractice, and thus, not cognizable under New York law.³³⁸

In sum, claims alleging that educational institutions or their agents have negligently evaluated, placed, or instructed students have met with some success in the courts when the courts have accepted them under a label of medical malpractice.³³⁹ Where, however, the courts have decided that educators' decision-making formed the basis for the defendant's conduct, they have refused to recognize the claims as non-actionable educational malpractice.³⁴⁰

520 N.Y.S.2d 37, 38 (App. Div. 1987). Moreover, in *DeRosa v. City of New York*, the New York Supreme Court, Appellate Division, considered a student's claim for educational negligence and malpractice, and medical malpractice against a public school for misclassification. 132 A.D.2d 592, 593-94, 517 N.Y.S.2d 754, 755-56 (App. Div. 1987). The plaintiff alleged that her school misdiagnosed and misplaced her in a class for the mentally retarded when she was merely deaf. *Id.* at 593, 517 N.Y.S.2d at 755. The court concluded that the claim was educational malpractice, and thus, not actionable. *Id.* at 594, 517 N.Y.S.2d at 756.

³³⁶ See 133 A.D.2d at 749, 520 N.Y.S.2d at 38.

³³⁷ *Id.*

³³⁸ *Id.* at 749-50, 520 N.Y.S.2d at 38.

³³⁹ See *Savino v. Board of Educ. of School Dist. No. 1*, 123 A.D.2d 314, 314-15, 506 N.Y.S.2d 210 (App. Div. 1986); *Snow v. State*, 98 A.D.2d 442, 447, 469 N.Y.S.2d 959, 962 (App. Div. 1983), *aff'd*, 64 N.Y.2d 753, 475 N.E.2d 454, 485 N.Y.S.2d 987 (1984).

³⁴⁰ *Sitomer v. Half Hollow Hills Cent. School Dist.*, 133 A.D.2d 748, 749-50, 520 N.Y.S.2d 37, 38 (App. Div. 1987); *DeRosa v. City of New York*, 132 A.D.2d 592, 593-94, 517 N.Y.S.2d 754, 755-56 (App. Div. 1987). Factors such as the child's age, the method of record keeping, and the form of payment for services appear to have some effect on the courts' determination of which malpractice label applies.

IV. A REVIEW OF PUBLIC POLICY: REALITY DEMANDS A CHANGE

The judicial system currently embraces malpractice claims brought against medical personnel, lawyers, and other skilled professionals.³⁴¹ The theory of these claims is that professionals hold themselves out to the public as possessing a higher level of knowledge or skill than the ordinary person, and thus, they invite public reliance on their special abilities.³⁴² The law, therefore, recognizes that professionals should demonstrate a minimum level of skill and be held liable for injury resulting from behavior that falls below that standard.³⁴³

A cause of action in professional malpractice requires that a plaintiff prove that the professional owed him or her a duty of care, that the professional breached a standard of care defining that duty, and that such breach proximately caused an injury.³⁴⁴ The standard of care, as the basis for a negligence action, is defined as the behavior usual and customary in the defendant's profession.³⁴⁵ Without a standard and duty of care no breach can occur and, consequently, no tort liability results.

In 1976, a public school graduate was one of the first plaintiffs to attempt to apply the theory of professional malpractice to educators whom he claimed had failed to educate him.³⁴⁶ The plaintiff in *Peter W. v. San Francisco Unified School District* alleged that despite his attendance at the defendant's school system for twelve years, he was unable to read and write competently.³⁴⁷ This student claimed that as a result of the school's failure to exercise the professional skill of an ordinary and prudent educator, he had suffered recognizable injury.

In denying the boy's claim, the California Court of Appeal reasoned that it could only sanction the novel cause of action for professional malpractice if public policy supported it.³⁴⁸ Public policy, the *Peter W.* court maintained, was dictated by a host of practical, fiscal, and philosophical issues.³⁴⁹ Recognition of this new area of

³⁴¹ See *supra* notes 35-40 and accompanying text.

³⁴² See *supra* notes 35-46 and accompanying text.

³⁴³ *Id.*

³⁴⁴ See *supra* note 38 and accompanying text.

³⁴⁵ See *supra* notes 42-46 and accompanying text.

³⁴⁶ See *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 817-18, 131 Cal. Rptr. 854, 855-56 (Ct. App. 1976). See *supra* notes 52-72 and accompanying text for a discussion of the *Peter W.* decision.

³⁴⁷ *Peter W.*, at 818, 131 Cal. Rptr. at 856.

³⁴⁸ *Id.* at 822, 131 Cal. Rptr. at 859.

³⁴⁹ *Id.* at 822-23, 131 Cal. Rptr. at 859-60.

tort liability, the *Peter W.* court noted, required that the court first discuss and balance each of the relevant public policy concerns for or against recognition. After doing so, the *Peter W.* court concluded that public policy warranted dismissal of the action.

A year later, the New York Supreme Court, in *Donohue v. Copiague Union Free School District*,³⁵⁰ simplified and categorized most of the public policy issues that the *Peter W.* court had identified. By labeling these public policy issues as preventative, moral, economic, or administrative considerations, the *Donohue* court provided a framework for the subsequent debate over educational negligence. Preventative public policy issues included the ease or difficulty of establishing a standard of care for educators, proving causation, and evaluating educational injury.³⁵¹ Moral public policy considerations included society's view toward the student-teacher relationship, the degree to which the courts should involve themselves in that relationship, and education's social utility. Finally, economic and administrative public policy considerations encompassed discussions of the school's ability to pay damages, and the possibility of a flood of litigation.

Courts have validated this public policy framework as a basis for judicial recognition of educational malpractice cases under a variety of fact patterns,³⁵² including whether the defendant is a private or public school, or a social services agency.³⁵³ Whether the plaintiff alleges misplacement, misdiagnosis, failure to educate, or breach of contract, courts have reviewed the same public policy considerations in order to reach their conclusions.³⁵⁴ Although no court has discussed all of the considerations that the *Peter W.* and *Donohue* courts raised, each court has selected one or more issues as the basis for its holding.

A. Look Who's Calling Them Professionals

Underlying the theory of professional malpractice is the assumption that the theory only applies to individuals who are professionals.³⁵⁵ Prosser and Keeton have defined professionals as persons

³⁵⁰ 64 A.D.2d 29, 407 N.Y.S.2d 874 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). See *supra* notes 73-92 and accompanying text for a discussion of the *Donohue* decision.

³⁵¹ *Id.* at 33, 407 N.Y.S.2d at 877.

³⁵² See *supra* notes 98-101 and accompanying text.

³⁵³ See *supra* notes 174-92 and accompanying text.

³⁵⁴ See cases cited *supra* notes 98, 104 and accompanying text.

³⁵⁵ See *supra* notes 35-40 and accompanying text.

who hold themselves out to society as having knowledge above and beyond that of ordinary citizens.³⁵⁶ At least one critic of educational malpractice has argued that educators are not professionals, and consequently, do not deserve a professional liability standard, even if the courts can define one.³⁵⁷

Nevertheless, as Judge Davidson argued in his *Hunter* dissent, public educators, like lawyers and medical personnel, are certified, specially trained individuals who hold themselves out as possessing certain skills and knowledge that ordinary persons do not share.³⁵⁸ Our society has increasingly come to rely on educators' skills and the expertise that they impart to our nation's children.³⁵⁹ Interestingly, courts themselves in considering educational malpractice claims have refused to substitute their judgment for what they call that of professional educators.³⁶⁰ For example, in *Palandino v. Adelphi University*, the court deferred responsibility for determining pedagogic methods to the state's professional educators.³⁶¹

Clearly, the courts have not accepted that laypersons possess the same level of skill and knowledge as teachers and other educators. The debate over the judiciary's ability to establish a standard of care for educators, and over the jury's ability to understand it, indicates that the courts believe that non-educators cannot understand education.³⁶² Some courts have even characterized education as an occupation requiring so much special skill and ability, that they have concluded that all educational policy decision-making should be left to education officials.³⁶³

In effect, courts have proclaimed that educators are such skilled professionals that they do not qualify for a legal professional status for purposes of malpractice claims. In other words, teachers, by virtue of their special task, are immune from liability according to the courts. One commentator even asserts that teachers are un-

³⁵⁶ See PROSSER & KEETON, *supra* note 35, at 164, 186-87.

³⁵⁷ See *supra* notes 112-18 and accompanying text.

³⁵⁸ See *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 588-89 (Md. 1982) (Davidson, J., concurring in part and dissenting in part).

³⁵⁹ See *supra* notes 293-300 and accompanying text.

³⁶⁰ *Hoffman v. Board of Educ. of New York*, 49 N.Y.2d 121, 126-27, 400 N.E.2d 317, 320, 424 N.Y.S.2d 376, 379 (1979).

³⁶¹ See 89 A.D.2d 85, 91-93, 454 N.Y.S.2d 868, 872-73 (App. Div. 1982). See *supra* notes 174-83 and accompanying text for a discussion of the *Palandino* decision.

³⁶² See *supra* notes 112-32 and accompanying text.

³⁶³ See *supra* notes 261-74 and accompanying text.

qualified to be labeled professionals,³⁶⁴ and yet, so skilled as to be beyond judicial review.³⁶⁵

In sum, the courts' own standard of care analysis is evidence that education clearly falls within the parameters of professional malpractice, and therefore, should be subject to judicial review. Because educators possess a special expertise, and must obtain state certification in the same manner as lawyers and medical personnel, they should be subject to malpractice actions.³⁶⁶ The courts' conclusion that education is complex and dependent on educators' skill should lead them to assume, not abdicate, responsibility for reviewing professional misconduct in education.

B. *Creation of a Professional Standard of Care: Nothing New*

Courts that have refused to recognize educational malpractice claims have articulated a recurring public policy theme that the difficulties of proving the tort elements in the educational context are so formidable as to warrant judicial nonrecognition of the cause of action. Thus, opponents of educational malpractice claims focus much of their attention on what they perceive as the judiciary's inability to establish a standard of care for educators.³⁶⁷ Education, they argue, is so complex, subjective, and collaborative, as to make the establishment of a standard of care impossible.³⁶⁸ These opponents lead us to believe that teaching is so mysterious, so delicate, and so random as to be devoid of generally accepted guidelines upon which the courts could base a common-law duty of care. For example, in *Smith*, the court concluded that judicial review of educational policies would result in an unacceptable, highly speculative inquiry because of the subjective nature of educational methodology.³⁶⁹ Similarly, the *Donohue* court claimed that triers of fact would be unable to decide which educational policies should have been

³⁶⁴ See Funston, *supra* note 2, at 774.

³⁶⁵ See *id.* at 795.

³⁶⁶ See *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 588-89 (Md. 1982) (Davidson, J., concurring in part and dissenting in part). See *supra* notes 138-41 and accompanying text.

³⁶⁷ See *supra* notes 119-32 and accompanying text.

³⁶⁸ See *supra* notes 112-219 and accompanying text.

³⁶⁹ See *Smith v. Alameda County Social Servs. Agency*, 90 Cal. App. 3d 929, 941-43, 153 Cal. Rptr. 712, 719 (Ct. App. 1979). See *supra* notes 124-29 and accompanying text for a discussion of the *Smith* decision.

pursued or avoided.³⁷⁰ Moreover, the *Peter W.* court concluded that because education was unlike marketplace or transportation professions, it was not a candidate for malpractice recognition.³⁷¹

Thus, some courts conclude that, unlike in other professions, the educational community cannot establish for the court an accepted standard of conduct for educators. This conclusion is inconsistent with traditional notions of professional malpractice. Historically, courts have reviewed the conduct of lawyers, psychiatrists, psychologists, brain surgeons, and even more recently the clergy, in plaintiffs' claims for malpractice liability.³⁷² Could it be that the interactive nature of therapy, the complexity of neurosurgery, or the discretion of religious counseling are more easily understood and definable than educational policies? Can it be that the courts are more comfortable reviewing the implementation of His standards for behavior than those of the local school board?

Despite the complexities of educational policy, generating a standard of care against which to measure educators' conduct is not the insurmountable obstacle that some courts have concluded.³⁷³ For instance, Judge Davidson, in his dissent in *Hunter v. Board of Education of Montgomery County*, correctly argued that courts consistently have recognized non-educational malpractice claims that have involved a myriad of intangibles and unknown quantities.³⁷⁴ He further accurately concluded that courts can evaluate an educator's methodology, like a physician's choice of treatment, against a professional standard that expert testimony establishes.³⁷⁵ Moreover, educational experts assert that empirical evidence on pedagogic methodology exists, and that courts could use such evidence to establish a professional standard of care for educators.³⁷⁶

For example, the California Court of Appeal used expert testimony in *Riverside v. Loma Linda University* to establish a standard of care for medical teaching.³⁷⁷ In *Riverside*, the court used expert

³⁷⁰ See *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 35, 407 N.Y.S.2d 874, 879 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

³⁷¹ *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860 (Ct. App. 1976).

³⁷² See *supra* notes 39-40 and accompanying text.

³⁷³ See *supra* notes 137-44 and accompanying text.

³⁷⁴ 439 A.2d 582, 589 (Md. 1982) (Davidson, J., concurring in part and dissenting in part).

³⁷⁵ *Id.* at 588-89 (Davidson, J., concurring in part and dissenting in part).

³⁷⁶ See *supra* notes 142-44 and accompanying text.

³⁷⁷ See 118 Cal. App. 3d 300, 317-18, 173 Cal. Rptr. 371, 380 (Ct. App. 1981). See *supra* notes 193-99 and accompanying text for a discussion of the *Riverside* decision.

testimony to determine that a medical school had not trained a county hospital's residents according to the standards of practice for reasonable medical teaching institutions.³⁷⁸ Similarly, the New York Supreme Court, Appellate Division, in *Snow v. State*, did not hesitate to use professional testimony in determining that a school's failure to reevaluate a student was an error of professional judgment.³⁷⁹ The *Snow* court easily deferred to the opinion of psychologists and medical personnel in concluding that the schools had negligently evaluated the plaintiff. In light of these decisions, it is not a stretch to imagine that courts could use expert witnesses in determining what constitutes appropriate conduct for all educators. Admittedly, the complexities of such evidence may be formidable, but no more so than evidence of the correct procedures for conducting open heart surgery, or for providing legal advice or psychological counseling.

Alternatively, if a court is unable to determine a common-law standard generated by expert testimony, it could rely on legislated standards.³⁸⁰ Admittedly, a majority of the courts that have considered educational malpractice claims based on violations of state law have concluded that state educational constitutional provisions and legislation do not create civil liability.³⁸¹ Often, these courts have concluded that the injury that a plaintiff claims to have suffered in an educational malpractice action is not the type of injury that the legislation contemplates, and therefore, the legislation is not a basis for tort liability.

For example, the Alaska Supreme Court, in *D.S.W. v. Fairbanks North Star Borough School District*, concluded that the Alaskan exceptional education act did not expressly or impliedly authorize a child's claim for damages resulting from its violation.³⁸² Furthermore, in *Pierce v. Board of Education of Chicago*, the Illinois Supreme Court held that the Illinois state constitution's educational provision was not self-executing, but rather was only a statement of general philosophy.³⁸³ Therefore, the *Pierce* and *D.S.W.* courts held that state

³⁷⁸ *Riverside*, 118 Cal. App. 3d at 317-18, 173 Cal. Rptr. at 380.

³⁷⁹ See 98 A.D.2d 442, 447-48, 469 N.Y.S.2d 959, 962-63 (App. Div. 1983), *aff'd*, 64 N.Y.2d 753, 475 N.E.2d 454, 485 N.Y.S.2d 987 (1984). See *supra* notes 322-31 and accompanying text for a discussion of the *Snow* decision.

³⁸⁰ See *supra* notes 148-60 and accompanying text.

³⁸¹ See *supra* notes 161-70 and accompanying text.

³⁸² 628 P.2d 554, 556 (Alaska 1981). See *supra* notes 165-70 and accompanying text for a discussion of the *D.S.W.* decision.

³⁸³ 69 Ill. 2d 89, 92-93, 370 N.E.2d 535, 536 (1977). See *supra* notes 162-64 and accompanying text for a discussion of the *Pierce* decision.

educators owed no mandatory duty of care to students, and no negligence cause of action against a school was recognizable.

Although regrettable, these conclusions are not a death toll for all claims of educational negligence. Even if legislative standards in and of themselves do not create a mandatory legal duty of care for educators, these standards are expressions of accepted principles that courts could use as guidelines for evaluating educators' conduct in their respective states. Historically, courts have willingly used state educational standards to evaluate the success or failure of state school funding.³⁸⁴ If courts use education legislation when determining liability for fiscal injustice, they should not balk at using the same standards where a child has been injured.

Admittedly, a theoretical standard of care does not always equal a legal duty of care.³⁸⁵ But if the concern underlying the public policy analysis of courts like *Peter W.*, *Donohue*, and *Smith* is the complex and ill-defined nature of educational methodology, legislated standards conceivably could be of some guidance. Because

³⁸⁴ In 1979, in *Pauley v. Kelly*, the West Virginia Supreme Court considered a class action claim that a system of financing public schools denied students a thorough and efficient education in violation of West Virginia's constitution, and refused to dismiss the plaintiffs' claim for relief. 255 S.E.2d 859, 861, 863, 884 (W. Va. 1979). The plaintiffs alleged that the defendant had not conformed with the West Virginia state constitution's education article which mandated that the legislature provide for a thorough and efficient system of schools. *Id.* at 861. The *Kelly* court reasoned that judicial review of the state's implementation of educational policy was appropriate. *See id.* at 863, 874. It further reasoned that although the legislature had discretionary judgment over educational policies, education was a fundamental right and the court had a right to monitor implementation of such policies. *See id.* at 878. In *Kelly*, the court reasoned that the court had to give content to the state constitutional phrase "thorough and efficient." *See id.* at 874-77. The court also noted that despite a general consensus that the judiciary should not undertake a review of educational legislation, courts had not hesitated to review legislative performance. *Id.* at 869-70. Consequently, the *Kelly* court concluded that a state-funded thorough and efficient education contained elements of literacy, simple mathematical ability, a knowledge of government, self-knowledge and knowledge of the environment, work training or advanced academic training, recreational pursuits, an understanding of the creative arts, and social ethics. *Id.* at 877. Thus, in remanding the case, the court noted that expert testimony and legislatively established standards could be used to set standards for the education system.

Similarly, in 1984, in *Pauley v. Bailey*, the West Virginia Supreme Court considered a class action claim that a school had failed to enforce the court-approved "Master Plan for Public Education" which set forth standards defining the educational role of the various state and local agencies and specific elements of educational programs, enumerated considerations for educational facilities and proposed changes in the educational financing system in violation of the state constitution. 324 S.E.2d 128, 129, 132-33 (W. Va. 1984). The court held that state educational officials had a duty to implement and enforce the Master Plan's policies and standards. *Id.* at 135. Thus, the *Bailey* court remanded the case for further court monitoring of the Master Plan's implementation. *Id.* at 137.

³⁸⁵ *See supra* notes 161-70 and accompanying text.

such legislation often sets out minimum standards for educational achievement,³⁸⁶ it could serve as a measure of educator conduct. If the courts can defer to the legislative branch to determine educational policy,³⁸⁷ then they can also use legislative enactments to award civil damages to children who have been negligently taught.

In sum, courts' conclusions that educational malpractice claims make it impossible for them to establish a standard of care for educators because of education's complexity do not acknowledge current legal reality. Courts long ago assumed the responsibility of establishing standards of conduct for non-educator professionals with the help of expert witnesses, and they can do so for educators. Alternatively, although statutory guidelines regarding education cannot create tort liability per se, courts could use them as a framework in which to evaluate educators' conduct for educational malpractice claims. After the courts have adopted one of these standards of care, they would be free to determine if the other elements of an educational malpractice claim, breach, causation, and injury, were present.

C. Causation and Injury: Inconsistencies in the Law

The courts' review of the elements of public policy have included cursory discussions of the difficulties inherent in proving causation and assessing a plaintiff's injury in educational malpractice claims.³⁸⁸ They conclude that proof of causation is impractical,³⁸⁹ and that the value of educational injury is immeasurable.³⁹⁰ For example, the *Peter W.* court decided that learning involved the interaction of multiple factors, many of which were beyond the control of the educational process.³⁹¹ Therefore, the *Peter W.* court concluded that proving educational negligence causation was impossible.³⁹² Similarly, because the *D.S.W.* court concluded that it was impossible to determine a child's academic success absent his teachers' negligent behavior, it reasoned that it was beyond the court's

³⁸⁶ See *supra* notes 159-60 and accompanying text.

³⁸⁷ See *supra* notes 119-32, 261-74 and accompanying text.

³⁸⁸ See *supra* notes 220-60 and accompanying text.

³⁸⁹ See *supra* notes 221-29 and accompanying text.

³⁹⁰ See *supra* notes 240-46 and accompanying text.

³⁹¹ See *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 823, 824-25, 131 Cal. Rptr. 854, 861 (Ct. App. 1976). See *supra* notes 50-72 and accompanying text for a discussion of the *Peter W.* decision.

³⁹² See 60 Cal. App. 3d at 825, 131 Cal. Rptr. at 861.

ability to prove that the defendant's conduct had caused the plaintiffs' injuries.³⁹³

Admittedly, as the United States District Court for the Northern District of Illinois, asserted in *Ross v. Creighton University*, education is a one-on-one, interactive endeavor that is administered on a large scale, involving a variety of internal and external factors.³⁹⁴ Although it is often difficult to determine why one student cannot master simple algebra and another excels in calculus, these conditions are no different from those that exist in the activities of other highly skilled professionals.³⁹⁵ As the New York Court of Appeals stated in *Donohue*, it assumes too much to conclude that causation in educational negligence can never be proven.³⁹⁶

Analogously, it is not clear in medical malpractice actions why one patient responded to medical treatment and another remained comatose. The same logic that motivates courts to review medical malpractice allegations when a patient is left without motor skills after a twelve hour operation should prompt a judicial review of educational malpractice allegations when a child is left without basic reading or arithmetic skills after twelve years of education. Like any other professionals, educators take students as they find them, and courts should therefore hold an educator liable if the educator's actions make a child worse off than he or she would have been absent the educator's negligent conduct.³⁹⁷

In support of the conclusion that causation should not be a major obstacle to judicial recognition are the New York Supreme Court's decisions in *Snow v. State* and *Savino v. Board of Education*.³⁹⁸ In *Snow*, under the well-worn label of medical malpractice, the court had no difficulty concluding that a school's negligent reevaluation and placement of a student was the cause of the student's injuries, and thus, that the school's conduct was subject to judicial review.³⁹⁹

³⁹³ *D.S.W. v. Fairbanks N. Star Borough School Dist.*, 628 P.2d 554, 556 (Alaska 1981). See *supra* notes 165-70 and accompanying text for a discussion of the *D.S.W.* decision.

³⁹⁴ See 740 F. Supp. 1319, 1328-29 (N.D. Ill. 1990). See *supra* notes 225, 308-10 and accompanying text for a discussion of the *Ross* decision.

³⁹⁵ See Elson, *supra* note 49, at 670. See *supra* notes 133-44 and accompanying text for a discussion of courts' ability to establish a common-law standard of care for educators.

³⁹⁶ *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353-54, 418 N.Y.S.2d 375, 377 (1979).

³⁹⁷ See Jerry, *supra* note 232, at 206-07.

³⁹⁸ See *supra* notes 322-34 and accompanying text for a discussion of the *Snow* and *Savino* decisions.

³⁹⁹ See *Snow v. State*, 98 A.D.2d 442, 449, 469 N.Y.S.2d 959, 963 (App. Div. 1983), *aff'd*, 64 N.Y.2d 753, 475 N.E.2d 454, 485 N.Y.S.2d 987 (1984).

Likewise, in *Savino*, the court concluded that a claim alleging that a school negligently administered a psychological test to a student was not educational malpractice, and therefore, the court refused to dismiss the action.⁴⁰⁰ Presumably, the plaintiff in *Savino* would have been more successful if he had brought the claim under a medical malpractice label. These two cases raise the same issues of multiple factors, interactive instruction, and individual motivation that critics of educational malpractice actions have identified. Thus, the holdings in *Snow* and *Savino* clearly support the New York Supreme Court's declaration in *Donohue* that one can prove causation in educational malpractice.

Finally, as the Montana Supreme Court concluded in *B.M. v. State*, whether educational malpractice has occurred is a question for the trier of fact.⁴⁰¹ One commentator suggests a child suing for educational malpractice who can assert the elements of a cause of action in tort should have the same opportunity as the children in *Savino* and *Snow* to present such evidence.⁴⁰² Whether the presence of external or internal factors will defeat an educational malpractice claim is a question of fact, and thus, is a decision for the judge or jury. The New York Supreme Court, Appellate Division, before it was reversed on appeal, correctly stated in *Hoffman*, that dismissal of educational malpractice claims is an intrusion on the jury's role as trier of fact.⁴⁰³ Hence, difficulty of proving causation is no reason to deny injured plaintiffs remedies they deserve.

In addition to reasoning that causation is impossible to prove in educational malpractice claims, courts have drawn the disturbing conclusion that educational injury is neither certain nor measurable. The *Donohue* court, for example, boldly stated that because every child is born ignorant, the failure of educational achievement is not a tortious injury.⁴⁰⁴ Not only have courts questioned the existence of injury, but in *Hunter*, the Maryland Court of Appeals went so far as to conclude that even if injury occurred, it could never be mea-

⁴⁰⁰ *Savino v. Board of Educ. of School Dist. No. 1*, 123 A.D.2d 314, 315, 506 N.Y.S.2d 210, 211 (App. Div. 1986).

⁴⁰¹ *B.M. v. State*, 200 Mont. 58, 60, 649 P.2d 425, 426 (1982). See *supra* notes 148-58 and accompanying text for a discussion of the *B.M.* decision.

⁴⁰² See Ratner, *supra* note 142, at 857. See *supra* notes 235-36 and accompanying text for a brief summary of this commentator's arguments.

⁴⁰³ *Hoffman v. Board of Educ. of New York*, 64 A.D.2d 369, 387, 410 N.Y.S.2d 99, 111 (App. Div. 1978), *rev'd*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

⁴⁰⁴ *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 37, 407 N.Y.S.2d 874, 880 (App. Div. 1978), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

sured.⁴⁰⁵ One commentator has even asserted that because the loss of an education is really only the loss of an expectancy interest measured in terms of self-esteem or earning potential, it is speculative, uncertain, and does not warrant damages.⁴⁰⁶

It is inconceivable, however, that in a country largely dependent on sophisticated technology and services, courts can hold that the loss of an education is not a measurable injury. In 1986, the United States Census Bureau, Education Department, reported that thirteen percent of all U.S. adults were illiterate in the English language, unable to read at a fifth grade level.⁴⁰⁷ One commentator estimates that four out of five young adults cannot summarize the main point of a newspaper article, read a bus schedule, or figure their change from a restaurant bill.⁴⁰⁸ The lack of basic education skills leads to low-wage, minimal skill jobs and an overall decline in the nation's economy.⁴⁰⁹ Thus, the courts should acknowledge that the lack of an adequate education is a real and substantive injury.

Although courts may have difficulty in assessing the injuries that educational malpractice plaintiffs may suffer as a result of a loss of self-esteem, job opportunity or earning potential, they should not abdicate their responsibility to remedy wrongs simply because of inconvenience.⁴¹⁰ Judge Davidson correctly noted in his *Hunter* dissent that courts have long recognized mental or emotional distress injuries.⁴¹¹ In divorce settlements, for example, courts have considered education as a marital asset that the judiciary must allocate.⁴¹² Courts have valued skills or education when they have affected future earning ability.⁴¹³ Thus, difficulty in assessing the

⁴⁰⁵ See *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 585 (Md. 1982), modifying 47 Md. App. 709, 425 A.2d 681 (Ct. Spec. App. 1981). See *supra* notes 135-44 and accompanying text for a discussion of the *Hunter* decision.

⁴⁰⁶ See Funston, *supra* note 2, at 784. See *supra* notes 328-33 and accompanying text.

⁴⁰⁷ A. LEAN & W. EATON, *EDUCATION OR CATASTROPHE* 27 (1990). See generally M. CETRON, *SCHOOLS OF THE FUTURE: HOW AMERICAN BUSINESS AND EDUCATION CAN COOPERATE TO SAVE OUR SCHOOLS* 7 (1985) (stating that sixty percent of the United States' adult population cannot read well enough to go through their everyday lives without difficulty).

⁴⁰⁸ D. KEARNS & D. DOYLE, *supra* note 1, at 1.

⁴⁰⁹ *Youths Lacking Special Skills Find Jobs Leading Nowhere*, N.Y. Times, Nov. 27, 1990, at 1, col. 3.

⁴¹⁰ See *supra* notes 230-36, 253-57 and accompanying text for discussions of the provability of causation and injury in educational malpractice claims.

⁴¹¹ *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 589 (Md. 1982) (Davidson, J., concurring in part and dissenting in part).

⁴¹² See Jerry, *supra* note 232, at 203 n.71; see also Krauskopf, *supra* note 256, at 388-89; Note, *supra* note 254, at 756-59.

⁴¹³ See Jerry, *supra* note 232, at 203 n.71.

damages that may result from educational malpractice is unpersuasive in refusing to recognize the tort of educational malpractice.⁴¹⁴

In conclusion, it is not impossible to prove in the twentieth century that an illiterate teenager has suffered a measurable injury that his educators may have caused.⁴¹⁵ Difficulties in proof of causation and injury are not unique to educational actions; they are inherent in all professional malpractice claims. In fact, the same courts that have refused to recognize educational malpractice claims because of such practical difficulties have welcomed similar actions that were brought under an alternative label. Clearly, arguments against recognition of educational malpractice claims that cite the difficulties of causation and injury do not acknowledge the advancements that both pedagogy and modern complex litigation have made in the last decade.

D. *Judicial Review Need Not Be Unsophisticated or Intrusive*

Under the heading of moral public policy considerations, the courts have devoted much time to discussing the desirability of judicial involvement in state educational policies.⁴¹⁶ That is, the courts in *Donohue*,⁴¹⁷ *Smith*,⁴¹⁸ and some commentators⁴¹⁹ have suggested that unsophisticated jurors and intrusive court officials necessarily plague judicial review of educational malpractice claims. Repeatedly, courts have suggested that jurors are not able to decipher the subtleties of educational methodology. In addition, courts have reasoned that they are not legislators and do not want to involve themselves in making educational policies.⁴²⁰

For example, in *Donohue*, the New York Supreme Court concluded that the judicial system should not test the efficacy of educational programs and pedagogical methods.⁴²¹ The New York Court of Appeals in *Hoffman* also expressed its reluctance to sub-

⁴¹⁴ *Id.* at 203.

⁴¹⁵ See *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 377 (1979). See *supra* notes 240-57 and accompanying text for a discussion of whether educational injury can be measured.

⁴¹⁶ See *supra* notes 260-302 and accompanying text.

⁴¹⁷ See *Donohue*, 64 A.D.2d at 35-37, 407 N.Y.S.2d at 879-80.

⁴¹⁸ See *Smith v. Alameda Social Servs. Agency*, 90 Cal. App. 3d 929, 936-37, 153 Cal. Rptr. 712, 715-16 (Ct. App. 1979).

⁴¹⁹ See *supra* notes 119-32 and accompanying text for a discussion of courts' and jurors' perceived unsophistication.

⁴²⁰ See *supra* notes 361-74 and accompanying text for a discussion of courts' unwillingness to sanction judicial review of educational malpractice claims.

⁴²¹ See *Donohue*, 47 N.Y.2d at 444-45, 391 N.E.2d at 1353-54, 418 N.Y.S.2d at 378.

stitute its judgment for that of professional educators.⁴²² Similarly, the Maryland Court of Appeals in *Hunter* concluded that it was in no position to oversee the formulation of educational policies or schools' day-to-day operations.⁴²³ Review of educational policies, the *Hunter* court concluded, was the exclusive territory of state legislatures and local school officials.⁴²⁴ Thus, courts have indicated that the judicial system is unwilling and unprepared to evaluate and judge the subtle decision-making of our nation's educators.

This conclusion seems suspect in light of the complex issues that confront juries in other malpractice claims. Perhaps the *Torres* court feared that the jury would not have understood that a school agent was negligent in placing a Spanish-speaking child in a class for the mentally retarded because he failed an I.Q. test written in English.⁴²⁵ Or, maybe the court in *Hoffman* reasoned that state school officials had exercised their discretion appropriately when they placed a child with normal intelligence into a class for the mentally retarded for eleven years without retesting him.⁴²⁶ Certainly, the *Peter W.* court believed that to review an illiterate, math-deficient public school graduate's claim of negligence would require the court to second-guess legislative standards.⁴²⁷

And yet, it is difficult to conclude that the fact patterns in *Torres*, *Hoffman*, or *Peter W.* were more complex or confusing than the evaluation and instructional treatment that characterized the defendants' conduct in *Snow* or *Savino*. In *Snow*, the court did not hesitate to substitute its judgment for the judgment of professionals under the label of medical malpractice.⁴²⁸ The *Torres* court suggested that the defendant school's failure to have the look and feel of a medical facility like the *Snow* defendant's institution was a determining factor in the court's decision to dismiss the plaintiff's claim. Since when does the look and feel of a negligent facility determine whether an injured child receives legal compensation?

⁴²² See *Hoffman v. Board of Educ. of New York*, 49 N.Y.2d 121, 125-26, 400 N.E.2d 317, 319-20, 424 N.Y.S.2d 376, 378-79 (1979).

⁴²³ *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 585 (Md. 1982).

⁴²⁴ *Id.* at 585-86.

⁴²⁵ See *supra* notes 184-92 and accompanying text for a discussion of the *Torres* decision.

⁴²⁶ See *supra* notes 264-74 and accompanying text for a discussion of the *Hoffman* decision.

⁴²⁷ See *supra* notes 52-72 and accompanying text for a discussion of the *Peter W.* decision.

⁴²⁸ See *supra* notes 322-34 and accompanying text for a discussion of the *Snow* and *Savino* decisions.

Whatever the validity of these decisions, claims involving misplacement, misdiagnosis, or negligent teaching do not necessitate that courts and layjurors determine pedagogic methodology or second-guess legislatures. Educational malpractice claims merely ask that the court enforce accepted professional or legislative education standards.⁴²⁹ Once courts acknowledge that a common-law or statutory standard of care for educators exists, the courts' argument that they are encroaching on the legislature's power or local education officials' expertise loses its force. In such a world, the judgment of accepted educational methodology or provisions of state legislation will be substituted for the judgment of negligent educators. Thus, the courts' only responsibility would be to enforce already existing standards, and not to set such standards.

For instance, if the courts were to adopt a common-law standard of care, the use of expert testimony would greatly limit the extent to which courts would be substituting their own judgments for those of professional educators. In these instances, a jury would be asked simply to compare the defendant's activity to that of the usual and customary conduct of educators. In such cases, the court would be substituting a prudent educator's judgment for the judgment of the alleged negligent educator. Courts have long used this approach in medical malpractice claims, and there is no reason why they cannot use it in educational malpractice claims as well.

Alternatively, courts could use legislative enactments as a tool for evaluating educators' conduct as courts have done in the past. For example, in *B.M. v. State*, the Montana Supreme Court held that a school's failure to test and place a special needs student in accordance with the state constitution may subject the school to liability.⁴³⁰ In his concurring opinion, Chief Justice Haswell noted that the constitution created a mandatory statutory duty of care for state educators which the court could enforce.⁴³¹ Likewise, in *Donohue*, Judge Suozzi in dissent pointed to a New York regulation requiring that state diploma recipients satisfactorily complete an approved four year course of study.⁴³² Judge Suozzi argued that

⁴²⁹ See *supra* notes 148-60 and accompanying text for a discussion of courts' ability to derive a statutory standard of care for educators.

⁴³⁰ 200 Mont. 58, 63-64, 649 P.2d 425, 427-28 (1982). See *supra* notes 148-58 and accompanying text for a discussion of the *B.M.* decision.

⁴³¹ See *B.M.*, 200 Mont. at 65, 649 P.2d at 428 (Haswell, J., concurring).

⁴³² See *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 42-44, 407 N.Y.S.2d 874, 883-84 (App. Div. 1978) (Suozzi, J., dissenting), *aff'd*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

Donohue's failing grades were clearly in violation of legislative standards, and thus, the school's decision to graduate him was suspect and subject to judicial review.⁴³³

Judges and commentators have suggested that where legislated accountability standards for educators exist, the courts need only enforce, not evaluate, such standards.⁴³⁴ Thus, in adopting a standard of care for educators set forth in legislation, courts would merely be substituting the judgment of state officials and educational experts for the alleged negligent educator's judgment. As Judge Davidson suggests in his *Hunter* dissent, there is no reason to believe that the legislature's delegation of responsibility to education officials was intended to provide those officials with immunity for their negligent conduct in failing to uphold the state's own educational standards.⁴³⁵

In sum, judicial intervention on behalf of plaintiffs whom educators have injured need not be heavy-handed and unguided. The spectre of judicial encroachment that the courts have evoked in deciding educational malpractice claims is not the inevitable outcome of recognizing such claims. By adopting a standard of care for educators in common-law or statutory decree, the courts will remove any possibility of unwarranted judicial interference in state educational policies. Armed with expert testimony or legislative language describing accepted conduct, a court can evaluate a defendant educator's alleged negligent behavior without stepping on the turf of state education officials.

E. *Taking Comfort in Contracts: Leaving out the Disadvantaged*

Ironically, some courts that have considered educational negligence breach of contract claims against private institutions have indicated that contract terms are more justiciable as a standard of care for educators than statutory provisions or accepted professional conduct.⁴³⁶ Although courts have been generally reluctant to accept educational malpractice causes of action, they appear more willing to entertain the notion of educational negligence when it is

⁴³³ See *Donohue*, 64 A.D.2d at 42, 407 N.Y.S.2d at 883 (Suozzi, J., dissenting).

⁴³⁴ See *supra* notes 148-60 and accompanying text for a discussion of courts' ability to derive a statutory standard of care for educators.

⁴³⁵ See *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 590 (Md. 1982) (Davidson, J., concurring in part and dissenting in part).

⁴³⁶ See *supra* notes 193-211 and accompanying text for a discussion of courts' willingness to find a standard of care for educators in contractual terms.

couched in the language of a consensual agreement between private parties. For example, the California Court of Appeal, in *Riverside v. Loma Linda University*, considered an indemnification action against a medical school for the value of a settlement of a medical malpractice action against the county's hospital.⁴³⁷ In *Riverside*, the county claimed that the school was negligent in discharging its contractual obligations to provide training for the hospital's residents.⁴³⁸ Holding in favor of the county, the *Riverside* court stated that the contract created a special relationship between the county and the medical school, and made objective standards available for determining an educator's standard of care.⁴³⁹ Thus, after reviewing the agreement and expert testimony, the *Riverside* court determined that the medical school had not trained the hospital residents properly, and that the school could be found liable for negligence.⁴⁴⁰

Furthermore, at least one court has concluded that where a private school promises it will detect and treat its students' special learning disorders, a contract relationship exists which the court can enforce.⁴⁴¹ In *Village Community School v. Adler*, the court reasoned that where a school made special promises to a student, the contract terms between the student and the school were not discretionary. The *Adler* court maintained that the defendant's conduct was reviewable for educational negligence based on breach of contract. Thus, the *Adler* and *Riverside* opinions indicate that courts are more likely to favor a student alleging negligent instruction in the form of a breach of a specific, private contract provision than a public school student alleging violation of a legislated or community standard of conduct.

It is clear, therefore, that some courts confronted with contract claims for educational malpractice have focused on the tangible nature of contracts to escape from the complexities of tort claims. An extreme example of this is the Ohio Court of Appeals' decision in *Malone v. Academy of Court Reporting*.⁴⁴² The *Malone* court went so far as to state that if a plaintiff's claim for breach of contract against

⁴³⁷ 118 Cal. App. 3d 300, 307, 173 Cal. Rptr. 371, 373 (Ct. App. 1981). See *supra* notes 193-99 and accompanying text for a discussion of the *Riverside* decision.

⁴³⁸ *Riverside*, 118 Cal. App. at 316, 173 Cal. Rptr. at 379.

⁴³⁹ *Id.* at 317 n.7, 173 Cal. Rptr. at 379-80 n.7.

⁴⁴⁰ See *id.* at 318-19, 173 Cal. Rptr. at 380.

⁴⁴¹ See *Village Community School v. Adler*, 124 Misc. 2d 817, 819, 478 N.Y.S.2d 546, 548 (Civ. Ct. 1984). See *supra* notes 201-02 and accompanying text for a discussion of the *Adler* decision.

⁴⁴² No. 90AP-264, 90AP-430 (Ohio App. Dec. 31, 1990) (LEXIS, States library, Omni file). See *supra* notes 203-11 and accompanying text for a discussion of the *Malone* decision.

a private educational institution does not mention the words educational negligence or malpractice, the claim is purely contractual, and the court will recognize it. This reasoning makes little sense if underlying the breach of contract is a failure to provide adequate educational services. Although one can argue that the existence of the contract alleviates a court's concern over a legal standard of care, it does not remove the difficulty of proving causation or injury. It also does not counter the public policy concerns over judicial review of pedagogic practices, and the administrative difficulties that courts have thrown up as barriers to recognition of educational malpractice actions.⁴⁴³ Thus, courts' relative eagerness to accept contract claims against private institutions is evidence that they have engaged in an inconsistent semantic game in order to avoid recognizing a valid malpractice claim against educators.

Again, this judicial avoidance does not mean that educational malpractice claims are doomed. The courts' progress toward favoring recognition of claims in the form of contract breaches supports the conclusion that courts can establish a standard of care for educators and recognize a tort claim. If courts have recognized that breach of a specific contract provision can result in educational liability, then courts can review specific educational policies for negligence. In other words, if courts can enforce contractual specifics without evaluating discretionary judgment, then they could conceivably enforce legislative specifics without second-guessing legislatures.

Unfortunately, the immediate result of the courts' evolution is not likely to be so forward thinking. With a contract in the left hand defining the behavioral obligations of a contracted educator, and the state constitution in the right hand defining minimum state education standards, courts appear to find more authority in the left hand. As a result, courts will probably continue the semantic shell game by providing a remedy for those children fortunate enough to have the resources to attend private educational institutions, but not for public school students. A greater number of the economically and socially disadvantaged children in this country are likely to attend public schools than will attend private institutions. Consequently, advantaged children whom private educators have injured will receive damages, while inner-city children will remain

⁴⁴³ See *supra* notes 220-29, 240-46, 351-74 and accompanying text for discussions of the procedural and administrative barriers that courts have cited as reasons for denying educational malpractice claims.

uncompensated. Unless the common law changes, these inequities will only worsen.

Courts have rationalized their refusal to change the common law and recognize educational malpractice by stating that current law does not disadvantage students.⁴⁴⁴ These courts have asserted that no civil action for educational negligence exists because more desirable out-of-court methods for settling such disputes are available. For example, the *Hunter* court, in holding that a student had no cause of action against his school, reasoned that administrative procedures existed that could correct erroneous educational practices and obviate the need for monetary damages.⁴⁴⁵ Monetary damages, the Alaska Supreme Court concluded in *D.S.W.*, were a singularly inappropriate remedy for educational injuries when tutorials were available.⁴⁴⁶ Thus, courts have concluded that recognizing a tort claim for malpractice would not add to the remedies currently available to plaintiffs who believe that educators have injured them.

Unfortunately, administrative procedures simply do not address the injuries that children have suffered as the result of educational malpractice.⁴⁴⁷ Often, plaintiffs bringing claims for educational malpractice have already graduated or are close to graduating from the school system. For instance, in his *Doe* dissent, Judge Eldridge correctly argued that students claiming educational malpractice are often in need of psychological treatment and special education, neither of which is available through administrative procedures.⁴⁴⁸ Consequently, although administrative review and injunctive relief may improve conditions for those students who still attend school, or who are at the start of their academic careers, these procedures offer little relief to an older plaintiff who no longer attends the defendant's school.

Admittedly, the United States judicial system is a strong ally of contractual relationships such as those between a private school and its students, but this favoritism should not work against public school students who have suffered injuries. Moreover, such a strict

⁴⁴⁴ See *supra* notes 275-81 and accompanying text for descriptions of alternative remedies to civil action for plaintiffs alleging educational malpractice.

⁴⁴⁵ *Hunter v. Board of Educ. of Montgomery County*, 439 A.2d 582, 586 (Md. 1982).

⁴⁴⁶ *D.S.W. v. Fairbanks N. Star Borough School Dist.*, 628 P.2d 554, 556 (Alaska 1981).

⁴⁴⁷ See *supra* notes 282-88 and accompanying text for a discussion of why alternative remedies do not adequately compensate educational malpractice victims.

⁴⁴⁸ See *Doe v. Board of Educ. of Montgomery County*, 453 A.2d 814, 823 (Md. 1982) (Eldridge, J., dissenting).

reliance on contract law in educational negligence claims harms plaintiffs who do not have specific enough contracts with their schools. In these circumstances, a civil action's damages award is likely to be the plaintiff's only opportunity to gain the educational or emotional support he or she requires.

In sum, in the absence of judicial recognition of a civil cause of action in educational malpractice, a public school student who has been emotionally or mentally damaged as the result of the professional educator's negligent behavior is without recourse. Conversely, if the student is enrolled at a private institution and is a party to a specific contract for services, the courts may consider a claim for breach of contract. This conclusion is unacceptable because it discriminates between private and public school students. If the fundamental justification for nonrecognition of educational malpractice is education's unique nature and societal role, the fact that one plaintiff pays for his or her education while another relies on state-run facilities should be irrelevant. Consequently, these inequities in the development of educational malpractice law suggest that the courts' analyses have been inconsistent and discriminatory, and therefore, need revision.

V. CONCLUSION

The courts' justification for their refusal to recognize educational malpractice claims is fundamentally flawed. First, it does not give equal weight to all of the relevant public policy considerations and favors administrative and judicial worries over more important societal concerns. Second, it has unjustifiably assumed that modern pedagogic methods are unlike other professional practices, and thus, defy judicial review. Third, courts have preemptively denied deserving malpractice victims, and thereby, usurped the power traditionally left to the jury or trial judge. Finally, in applying their questionable, and often inconsistent, public policy analyses, courts have treated plaintiffs discriminatorily.

Although courts have extensively discussed the negative impact of recognizing educational malpractice claims on the states' judicial and school systems, they have spent little time evaluating its potential beneficial impact on the nation's children. There is a dearth of judicial analysis concerning education's role in our society, the importance of the student-teacher relationship and the gravity of the rising level of illiteracy in this country. In order for the *Donohue* public policy framework to have any validity to the review of edu-

cational malpractice claims, it must include a balancing of *all* of the issues, not just those that courts find most attractive.

Moreover, education is not so unique or complex that courts can justify the barring of valid claims against educators for their misconduct. In view of courts' recognition of educators as professionals, courts can reasonably hold them to a professional standard of care. In order to avoid second-guessing educators and school officials, the trier of fact can use existing legislated educational enactments and expert testimony to establish a standard of conduct.

Some courts have concluded that they cannot understand education because it is too complex. As a result, they have preemptively removed from judicial review those questions of fact traditionally left to juries. The refusal to recognize educational malpractice claims has meant that deserving victims have been denied relief. This outcome is inconsistent with the fact that courts have long reviewed medical malpractice claims that require evaluation of complex issues and discretionary conduct. The courts' decisions to refuse to recognize educational malpractice claims entirely is a far more serious example of oppressive judicial interference than any that could arise during claimants' trials.

Lastly, courts have inconsistently applied their educational malpractice analyses, often distinguishing unconvincingly between medical and educational negligence claims. Thus, similar claims against educational institutions have resulted in opposite outcomes because of the label they bore. Courts have also demonstrated a marked preference for educational negligence claims based on contracts over nearly identical tort claims. As a result, private school students win damages while public school students do not. When forms of professional malpractice become so blurred and confused that not even the courts agree as to the dividing line, it is time to reevaluate these analyses.

In sum, courts that have decided educational malpractice claims have relied on incomplete and biased public policy analyses generated in the late 1970s. They have not acknowledged the current realities of the educational and legal professions. With the growing sophistication of educators, the possibility of serious injury resulting from a lack of education, and the vulnerability of children, the time is ripe for recognition of educational malpractice.

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